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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. —.

ROSE PUBLICKER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Rose Publicker, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Third Circuit, to review that Court's Judgment (R. 104) dated July 16, 1953 in petitioner's Appeal No. 10,951 in that Court affirming the decision by the Tax Court of the United States.

A certified transcript of the record of the case, including the proceedings in the United States Court of Appeals for the Third Circuit, is furnished herewith in accordance with the Rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involved gift tax deficiencies for 1946 and 1947 in the respective amounts of $2,733.75 and $41,272.50. The only question at issue in the proceedings below was what were the respective fair market values as of the respective dates of gift of diamond jewelry given by petitioner to her daughter in the years 1946 and 1947.

In finding deficiencies in gift tax liability for 1946 and 1947 the Tax Court, affirmed by the Court of Appeals, added to the asserted respective fair market values amounts representing Federal excise taxes paid by the donor upon the respective prices of the jewelry at the respective times of purchase by donor.

The 1946 gift, a marquise diamond weighing 20.5 carats mounted in iridium platinum setting with two tapered bullet shaped diamonds, had been bought by petitioner on April 19, 1941 for $45,000. The 10% Federal excise tax on the purchase in 1941 was $4,500. In petitioner's gift tax return for 1946 its value on the date of gift was reported as $50,000. The Tax Court, affirmed by the Court of Appeals, determined the value of the 1946 gift to be $58,500 based upon its cost of $45,000 plus 20% claimed appreciation in value of diamonds between 1941 and 1946 (i.e., $9,000) plus the $4,500 excise tax paid in 1941.

Petitioner made a second gift to her daughter on July 16, 1947 of an emerald-cut diamond weighing 33.45 carats set in ring, and a pair of marquise diamond ear clips, which had been purchased by petitioner on February 5, 1947 for $200,000; the 20% Federal excise tax on this purchase was $40,000. Petitioner reported the combined value on the date of gift as $121,000. The Tax Court, affirmed by the Court of Appeals, determined the value of the gift to be not less than $240,000.

The testimony of three admittedly qualified and long-established diamond merchants, who appeared for the peti-

tioner, variously estimating the value of the 1946 gift at from $46,125 to $51,250 and appraising the 1947 gift at from $78,590 to $122,000, was rejected. Respondent's only witness, an appraiser of jewelry, principally in estate valuation work, testified that the fair market value of the 1946 gift was $90,000 not including Federal excise tax and he appraised the 33.45 carat diamond at $200,000 not including excise tax. Respondent offered no evidence of the value of the ear clips, part of the 1947 gift. Respondent's witness conceded that no retail market exists for diamonds of the size and character here involved.

On appeal from the Decision of the Tax Court of the United States, Circuit Judge Herbert F. Goodrich dissented from the affirmance by the Court of Appeals for the Third Circuit in a very important part of the case, to which the first of the **Questions Presented** is directed—and on that aspect of the case the decisions of the Tax Court and the Court of Appeals were grounded largely on a prior decision of the Tax Court, a case of first impression, to which decision six Judges of the Tax Court dissented.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the final judgment here involved, under Section 1254(1) of the Judicial Code as amended, title 28 U. S. C. § 1254(1), Act of June 25, 1948, c. 646, 62 Stat. 928.

The Judgment (R. 104), for the review of which a writ of certiorari is here sought, is dated July 16, 1953. Petitioner filed a timely petition for rehearing (R. 105) which was denied on August 19, 1953.

STATUTE INVOLVED.

The proceeding involves Section 1005 relating to Gift Taxes of the Internal Revenue Code, title 26 U. S. C. § 1005, and Treasury Regulations 108, sec. 86-19 issued thereunder.

present case (R. 84) and the Court of Appeals apparently agreed in this view (R. 100).

We believe that the *Gould* case should not control the instant case because of their clearly distinguishable facts, but if the *Gould* case is deemed controlling we ask this Court to examine that case in which the majority holding was strongly dissented from by Judges Disney, Harron and Johnson who wrote separate dissenting opinions, and Judges Arundell, Van Fossan and Arnold who concurred in one or more of the dissents. No appeal was taken from the decision in the *Gould* case, but its holding was apparently approved by the Court of Appeals for the Second Circuit in *Anthony D. Duke v. Commissioner of Internal Revenue,* 200 F. 2d 82 (1952), in a brief opinion by Judge Frank which did not state the Court's reasoning.

The opinions of the six dissenting Judges of the Tax Court in the *Gould* case offer compelling reasons why the *Gould* case, the *Duke* case and *a fortiori* the present case, are not correctly decided by the respective Courts of Appeal.

As Judge Johnson of the Tax Court said:

> "Here the *price* of the ring was $58,000. Indeed, if that was not the price, one may well ask, On what was the tax of $5,800 computed? *That price is the best indication we have of the fair market value of the ring. Had the ring been received by the decedent by inheritance, and he had then given it to his wife, and the same ring was, at the time of gift, being listed by retailers at a price of $58,000 plus excise tax, without doubt a jeweler would have appraised the ring received by inheritance at a fair market value of $58,000.* We are only fixing the value of the ring itself, which is all that the wife received, not the amount the decedent was out of pocket in obtaining the ring." (Second italics supplied.)

Judge Johnson further pointed out that the decision required the payment of a Federal gift tax upon the amount

representing the excise tax, a repellent idea not required by the statute. 14 T. C. at p. 419.

Judge Harron (14 T. C. at p. 419) pointed out that petitioner paid the excise tax as a tax on the article which the retail seller merely collected for the government, the tax neither in fact nor in the view of the Statute having added to the value of the article.

Judge Disney agreed that the addition was a tax and not an appreciation in value and pointed out that the effect of the majority view was that the government taxed upon a tax which it had just required the purchaser to pay in addition to the value at the time of purchase (14 T. C. at p. 418).

In the present case, Judge Goodrich dissented forcefully from the majority opinion of the Court of Appeals, saying (R. 103):

> "If Mrs. Publicker gave these diamonds to her daughter and her daughter gave them to a friend and that friend gave them to another friend there would not, I take it, be additional sums added to value as a result of each transfer. But if the diamonds went through this same number of sales transactions somehow or other the value is supposed to be increased by the amount of tax involved in each instance. That seems to me to be incongruous. Some incongruities are unavoidable in tax law but this is one which seems to me as avoidable as it is obvious."

The question which has occasioned such divergent views among the Judges of the Tax Court and among the Judges of the Court of Appeals for the Third Circuit is an important federal question, having a considerable effect upon the administration of the Gift Tax law. The vigorous dissents in the courts which have considered the question up to now presage an inevitable conflict in decisions if the question is litigated in other Circuits. It is therefore a question which we believe should be settled by the Supreme Court of the United States.

Argument—Point 2.

(First Question Presented—Reason 4.)

The only statutory guide furnished by Section 1005 of the Internal Revenue code for determining the assessed value of a gift is "the value at the time of the gift" (26 U. S. C. § 1005).

Section 86-19(a) of Regulations 108 provides:

> ". . . The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell . . . Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property . . . All relevant facts and elements of value as of the time of the gift should be considered".

The effect of the decision of the Tax Court as affirmed by the Court of Appeals would substitute for the rule of the Regulations as a measure of value, as respects the 1946 gift, the cost to the donor increased by an amount purportedly representing the increase in value of jewelry between the date of the purchase (1941) and the date of the gift (1946) to which is added the excise tax actually paid by the donor (in 1941) on the lesser of these amounts. This is an incongruous result, inasmuch as it was necessary for the courts below to find that at the time of the gift in 1946 the fair market value of the 1946 gift was 20% greater than it had been in 1941 when purchased and then to add, not the excise tax which would have applied on a retail sale in 1946 of 20%, but the excise tax actually paid in 1941 which was in the amount of 10% and which had been applied to only a portion of the fair market value as found in 1946.

It is clear that the inclusion of an excise tax in the market value of a gift results in an unavoidable anomaly. If the excise tax should be included as a part of value at the time of the gift it should, for a 1946 gift, be calculated at

20%, as manifestly the 10% rate did not apply at the time of the gift. On the other hand, assuming that the tax actually paid at the time of purchase of the gift, was a part of cost, what basis in logic is there for disregarding this tax as part of the cost in determining the alleged extent to which diamond prices had become inflated by 1946? It is true that the Courts below avoided the dilemma of assessing a fictitious amount of tax (inasmuch as 20% tax was not paid) but in so doing they applied inconsistent standards in determining value. If the cost at the time of the purchase represented value at that time, any increase in value should be applied to the total cost. The decision seems to have been based upon a view in the Courts below that the original tax, while a part of cost, was not a part of value for the purpose of determining present value, but must nevertheless be considered a part of value to the extent it was actually paid.

This, it is submitted, renders Regulations 108 Section 86-19(a) meaningless inasmuch as value is by definition there declared to be the price at which the property would change hands on the date of gift. If the excise tax paid by the donor became a part of cost, this cost, which the Court of Appeals has stated becomes the price, will be the only logical base to which to apply any inflationary increase in value for the purpose of determining the price as of the date of gift. The result reached by the opinion of the Court of Appeals has no warrant in the Regulations. In fact, a companion section of the Regulations expressly applies to the valuation of gifts of stock the rule urged by petitioner and authorizes the use of stock market quotations without adding the taxes incurred in the sale of the shares. Nothing in the Regulations prevents Section 86-19(a) from being given the same effect which the Commissioner has more explicitly applied to stocks in Section 86-19(c). The Court of Appeals suggested that the question should be referred back to Congress (R. 102), but it is submitted that no Congressional action will be needed unless this Court permits

to stand the decision of the Court of Appeals which strains out of Section 2409 a "Congressional intent" having no clear basis in either Act or Regulations. This point is the subject of the next section of this Argument.

Argument—Point 3.

(First Question Presented—Reason 5.)

It is clear from the opinion of the Court of Appeals in this case that the Court regarded as decisive Section 2409 of the Internal Revenue Code, which was not argued before either that Court or the Tax Court. We believe this section can be demonstrated to be irrelevant and we submit that it has been erroneously interpreted by the Court of Appeals.

The ultimate question in the case is the determination for the purposes of the gift tax of the value of the gifts. As has been cited, the gift tax on jewelry is assessed against "the value thereof at the date of the gift", which the Regulations provide is the price at which such property would change hands between a willing buyer and a willing seller. The crucial question therefore is what is the price at which the gift would have changed hands on the date of the gift. The Excise Tax Act imposes on jewelry sold at retail a tax equivalent to 20% (prior to 1944, 10%) of the *price* for which sold.[2] Despite this plain statutory recognition of the fact that the tax is additional to price and added to price, the Court of Appeals pointed to a section of the Act which has no other purpose than to require the tax to be passed on to the purchaser (by preventing the seller from representing that it is not passed on) and the Court invoked this clause as demonstrating that the Excise Tax law requires that the value of the property plus the excise tax constitute price.

Section 2409 of Title 26 U. S. C. provides:

"*Penalty for representation that tax is not passed on.* Whoever in connection with the sale or lease, or

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2. Internal Revenue Code, Ch. 19, Section 2400, 26 U. S. C. § 2400.

offer for sale or lease, of any article, taxable under this chapter, makes any statement, written or oral, in advertisement or otherwise, intended or calculated to lead any person to believe that the price of the article does not include the tax imposed by this chapter, shall on conviction thereof be punished by a fine of not more than $1,000."

It seems clearly evident that the Congress did not intend, in using the word *price* in a general sense in Section 2409, to establish a concept which should override the plain words of Section 2400. Indeed, unless price is determined before the tax, there is nothing upon which the tax can be calculated. Section 2403 provides that, in determining *for the purposes of the Act* the price for which an article is sold, the amount of tax imposed whether or not stated as a separate charge shall be excluded.

The view of the Court of Appeals is plainly at odds with this Section. Its opinion states (R. 100);

> "The words quoted apparently mean *that for purposes of the excise tax* Congress wished the advertised or stated price of the articles covered by the tax to include the amount of the tax. In short, there is to be one price for the article which is to include the tax and, in effect, the tax is not to show insofar as members of the purchasing public are concerned." (Italics supplied.)

It is submitted, however, that by reason of Section 2403 the contrary is plainly true. Congress obviously contemplated the establishment of a price by a retailer to which the excise tax would be added as a percentage thereof and Congress expressly sanctions the usual and customary business practice of separately stating the tax, and in fact requires it in the retailer's return. The only possible reason for Section 2409 and the extent of the Congressional intent as evidenced in its title, was to prevent misrepresentation by sellers that the tax was not being passed on, *i.e.*, the misrepresentation that the tax would be paid out

of the seller's profit. If the seller were permitted to absorb the excise tax a case might be made for the Court's conclusion that the tax somehow adds to the value of the article. Under Section 2409, however, the seller must apprise a purchaser of the fact that the seller has not paid and cannot pay the tax, which to the contrary is required to be passed on to the buyer in addition to the price paid the dealer. To construe this section as intended to determine what is value for gift tax purposes is so evidently to extend the plain meaning of the Act as to be in effect to write a new section. The stated Congressional purpose is to prevent the seller from representing that he is absorbing the tax. The conclusion read into it by the Court of Appeals, that "Congress had in mind the consistent statutory pattern whereby the amount of the excise tax should be included in ascertaining the value of an article . . ." (R. 103) is not even remotely indicated by the Section.

The Court of Appeals pointed out (R. 101):

> "It is indeed an odd conception to say that an excise tax is part of the value of an article whether the tax be paid or unpaid."

It seems an even less justifiable conception to say that an excise tax must be *included* as part of the price of an article for the purpose of an Act which expressly states that for the purposes of the Act the price shall *exclude* the tax, especially when the tax cannot be calculated in the first place until the price has been determined.[3]

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3. In a special ruling published by telegram on December 20, 1949 (505 CCH, Sec. 6062) the Commissioner advised that the Excise Tax Law upon furs did not prohibit a retailer from advertising fur coats at stipulated prices subject to 20% Federal excise tax, the price tag including the promise to give credit if the tax were reduced or repealed within a specified period of time. The promise was regarded merely as a *price* adjustment resulting in redetermination of tax liability on the basis of a revised sale price. This ruling is plainly contrary to the present decision.

Argument—Point 4.

(First Question Presented—Reason 6.)

The Court of Appeals based its determination upon the premise that inasmuch as the property must be valued as a sale the amount of the excise tax must be included because "both the buyer and the seller would have in mind and necessarily would calculate the amount of the excise tax as part of the cost of the property" (R. 102).

This is merely another way of stating that the excise tax becomes part of the price. This statement is, we submit, entirely fallacious.

In assessing the retailer's excise tax Congress specifically declared that neither the tax itself nor any separately stated retail sales tax should be included in the price for which an article of jewelry is sold (26 U. S. C. § 2403).

Price is defined in Webster's New International Dictionary, Second Edition, G. & C. Merriam Company, as follows:

> "In the broadest sense, the quantity of one thing that is exchanged or tendered in barter or sale for another; the exchange value of one thing expressed in terms of units of another; in the narrower and more common sense, the amount of money given or set as the amount that will be given or received in exchange for anything; specifically, the amount at which actual current transactions take place in the market."

It is the plain intent of Section 2400 to use the word "price" in its second and ordinary meaning. Regulation 51 defines the retailer's price for purposes of the excise tax as the retailer's actual price at the point of sale (Section 325), which is to say that the usual meaning of the word applies. There is nothing in Section 86-19(a) of Regulations 108 to suggest that the word "price" is to be used in any other than its usual sense for gift tax purposes.

Nothing in the Gift Tax Act or in Regulations 108 requires or even suggests that fair market value for gift tax purposes means a "retail" price. Moreover, nothing in the Act justifies the conclusion that even where a retail price is found to constitute fair market value, this price is to be increased as if it constituted a retail *sale*. The excise tax is not a tax on articles of jewelry; it only attaches when title passes from a retailer to a purchaser (Regulations 51, Section 320.4). Whether it be deemed a tax upon the article or only upon the sale, it clearly does not add to the value of the article. The tax is not a part of an exchange other than from a retailer to a purchaser. It has no application to a private sale. Even in a sale at retail, the price demanded by the seller and paid by the buyer in exchange for the article does not include the tax. Obviously, the retailer obtains no benefit from the tax which he does not retain but merely collects for the Government. It does not in any sense represent a part of the amount demanded by the seller as the consideration. It plays no part in the amount at which actual current transactions, in the definition, take place in the market, inasmuch as the tax cannot be determined until the price is fixed and the amount of the tax is arbitrarily fixed by the Government and not by the merchant.

The illustration referred to by Judge Murdock writing for the majority of the Tax Court in the *Gould* case, cited in the opinion of the Court of Appeals (R. 101), of taxes upon cigarettes is unfortunate and misleading. The Federal Tobacco Tax is imposed upon the manufacture or import of tobacco (26 U. S. C. § 2000 et seq.) and the tax rate is a specified amount per thousand of cigars or cigarettes and per lb. as respects smoking tobacco, and consequently does not depend for its determination upon the prior determination of price. State taxes on tobacco, especially on cigarettes, are also customarily levied in fixed amounts per package. Such taxes, especially where so large a part of the ultimate price fixed for the article,

may in the lay mind become inextricably a part of the price, but it is to be noted that even the retailer does not collect the cigarette tax for the Government, but merely recoups the cost to him of tax stamps already affixed to the package sold by him.

The opinion of the Court of Appeals apparently fails to consider that the excise tax on jewelry forms no part of a private sale not by a retailer so that if petitioner had sold the diamonds rather than made gifts of them, there would have been no excise tax paid, yet the value of the diamonds could in no sense be said to have changed merely because they were sold instead of given to an individual.[4]

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4. If petitioner, instead of giving the 1947 gift to her daughter, had on the date of the gift sold it to a stranger for exactly the same price that she had paid for it five months previously, viz. $200,000, the transaction would, of course, have involved no excise tax inasmuch as the tax applies only to a retailer. If her purchaser immediately made a gift of the stone and declared its value for gift tax purposes as $200,000, it is indisputable its declared value would have been immune to attack. Neither the Government nor the Government's witness contended that the fair market value of the 1947 gift in this case was in excess of $200,000, *before tax*. It would be preposterous if identical stones both bought at retail for $200,000, plus $40,000 excise tax, would in a transfer on the same day have a fair market value of $200,000 if sold to an individual, but $240,000 if disposed of by gift. It could not be reasonably contended in the supposed case that petitioner would have obtained less than fair market value in the private sale merely because she had not recouped the tax paid by her to the retailer. She is not required to pass it on nor is she required to collect the tax for the Government on private sale. She has received the full fair market value, even according to the view of the Government's expert witness, upon receiving the price the dealer charged her, viz. $200,000.

Judge Goodrich pointed out in his dissenting opinion (R. 103) that a series of gifts would not result in added value and considered it an obvious and avoidable incongruity to hold that upon a number of sales the value would

Moreover, the excise tax by definition is not a part of the price demanded by the seller and paid by the buyer, even in a retail sale. To the contrary, the seller must determine his price and then apply the percentage in order to determine the excise tax which he merely collects for the Government.

And in considering what is meant by a "willing seller" in the definition in Regulations 108 Section 86.19, we must recognize that the seller in a retail sale of jewelry has become induced or willing to part with his property, knowing full well that he will receive therefor only the price charged, and not the price plus the excise tax imposed upon the transaction. It is the price alone therefore that causes the seller to part with his property.

In disregarding this self-evident proposition and in adopting the contrary as its premise, we submit that the Court of Appeals has reached a conclusion which is clearly erroneous.

Argument—Point 5.

(Second Question Presented—Reason 7)

In accepting as conclusive evidence of value of the 1947 gifts an isolated sale of a diamond of the size and character here involved, and rejecting the evidence of admittedly qualified experts as to actual fair market value, the Court below and the Tax Court accepted a standard which does not conform to the requirement of the Regulations for determining value for gift tax purposes.

The record shows clearly the difficulty encountered by even the most experienced diamond merchants in finding buyers for diamonds of the size of twenty carats and over. It must be accepted as a fact that diamonds of this size

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be somehow increased by the amount of tax involved. The foregoing situation presents at least an equally incongruous result which seems clearly to be required by the opinion of the Court of Appeals.

are very rarely sold. Moreover, it is equally patent that the actual sale price in such an isolated transaction is usually affected by peculiar attendant circumstances so as to be far from determinative of fair market value.

A diamond of extraordinary size and of rare and unusual character cannot be classified as readily saleable merchandise, for there are very few potential buyers. Where such a diamond is being offered to a purchaser and there is no other article available like the one offered (R. 59) there are usually special circumstances influencing the price such a buyer might be willing to pay. Obviously, the buyer may not have the alternative of going to another seller to buy a comparable diamond. The fact is that when a buyer is sufficiently interested and can afford to buy one of the world's rarities, the price he will pay is very likely to be the maximum he is able to pay, having nothing to do with fair market value. There can be no doubt that this is the practice in the diamond business as in other comparable situations, such as the sale of art objects, rare paintings, rare manuscripts, etc. The Government's witness, Lauterbach, *said that any price could be put on a diamond of the type involved in the 1946 gift* (R. 67).

Respondent contended, and the Courts below accepted the argument, that the sale price of the 1947 gifts was determinative of their value. However, if any one fact stands out clearly in this case, it is that the price paid by the petitioner for the 33.45 carat diamond was not the fair market price or value and that petitioner had been persuaded to pay far in excess of the fair market value.

The Regulations require for the determination of value under the Statute something more than mere evidence of a sale. A sale establishes a price paid in the market, but the Courts have always recognized that sales in restricted markets or under unusual circumstances signify neither value nor market value. It is especially true that in the case of unique jewelry, art masterpieces and rare manuscripts the evidence of a single sale does not establish a "fair market price".

The standard of fair market value is a judicially determined measure which takes account of the foregoing considerations. Both the rule and the reason were clearly stated in *Heiner v. Crosby*, 24 F. 2d 191, CCA 3d (1926). In that case which considered shares of stock but applied principles of law equally applicable to the present case, the Court of Appeals for the Third Circuit said:

> "The fair market price or value of stock at a particular time is a question of fact, to be determined from all the circumstances. Market price implies the existence of a market, of supply and demand, of sellers and buyers. Sales are always evidence of a market price, but the statute requires that, in 'ascertaining the gain derived from the sale' there must be not simply a 'market price' but a 'fair market price'. *Sales made at a particular time and place may be significant, but the price paid is not necessarily decisive of fair market price or value. The fact of sale, in itself and without regard to the circumstances under which the sales were made, does not conclusively establish either statutory fair market price or value.* Sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales, and sales in a restricted market, may neither signify a fair market price or value nor serve as the basis on which to determine the amount of gain derived from the sale. In such cases resort must be had to evidence to determine 'fair value'. Offers made in good faith and opinions of intelligent men experienced in the business are admissible to show fair value." (Cases cited.) (Italics supplied.)

Petitioner's witnesses, conceded by the Courts below to have been fully qualified experts experienced in the diamond business, placed value upon the diamonds which represented the retail price to anyone, including to an individual for personal use. Their testimony made it plain that an individual buyer for large diamonds is a rarity

and that only a dealer can expect to develop a market for such a gem. Even then buyers are not easily or frequently found. Both of petitioner's purchases had been made from dealers, but an isolated sale does not constitute evidence of a market.

It is submitted that the Court of Appeals erred in failing to apply its former decision in *Heiner v. Crosby* to the present case.

Moreover, that Court departed from the evidence and entered the field of sheer speculation when it stated "the possibility of a more favorable private sale cannot be entirely eliminated", (R. 96) and that "cost and market value realizable on sale of the diamonds to an individual for his personal use might well have been substantially the same" (R. 97). The evidence was entirely to the contrary.

CONCLUSION.

It is respectfully submitted that because of the importance of the question of whether the Federal excise tax should be added to price to determine value for gift tax purposes, certiorari should be granted in this case and that the strong dissents by six members of the Tax Court of the United States to the initial statement of the challenged ruling, as well as the vigorously expressed disapproval by Judge Goodrich in dissenting to the decision of the Court of Appeals in this case, emphasize the serious doubt still existing as to the correctness of the decision and present an important question of federal law which should be settled by the Supreme Court of the United States.

Respectfully submitted,

EARL JAY GRATZ,
Attorney for Petitioner.

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Appendix.

RELEVANT DOCKET ENTRIES.

May 18, 1950.	Petition received and filed. Taxpayer notified. Fee paid.
May 18, 1950.	Copy of Petition served on General Counsel.
May 18, 1950.	Request for Circuit Hearing in Philadelphia, Pa. filed by taxpayer. Granted 5/31/50.
June 30, 1950.	Answer filed by General Counsel.
July 7, 1950.	Copy of answer served on taxpayer, Philadelphia.
Nov. 9, 1951.	Hearing had before Judge LeMire on the merits. Stipulation of facts with attached exhibits filed. Petitioner's brief due Dec. 24, 1951; respondent's brief due January 23, 1952; petitioner's reply brief due February 12, 1952.
Nov. 23, 1951.	Transcript of Hearing 11/9/51 filed.
Dec. 24, 1951.	Brief filed by taxpayer. Copy served.
Jan. 3, 1952.	Motion to correct transcript filed by taxpayer. Granted 4/4/52.
Mar. 24, 1952.	Answer brief filed by General Counsel.
Apr. 14, 1952.	Reply brief filed by taxpayer. Copy served.

May 26, 1952.	Memorandum findings of fact and opinion rendered. LeMire J. Decision will be entered under Rule 50. Copy served.
Aug. 19, 1952.	Agreed computation filed.
Aug. 21, 1952.	Decision entered, LeMire J. Div. 5.
Oct. 9, 1952.	Petition for review by U. S. Court of Appeals, 3rd Circuit, filed by taxpayer.
Oct. 9, 1952.	Proof of service filed.

PETITION.

Petitioner, Rose Publicker, hereby appeals from the determination of the Commissioner of Internal Revenue contained in notice of claimed deficiency bearing date February 23, 1950, alleging deficiency in gift tax liability for calendar years 1946 and 1947, and as the basis of her appeal states as follows:

1. Petitioner is an individual, whose address is 1429 Walnut Street, Philadelphia, Pennsylvania. The returns for the periods herein involved were filed with the Collector of Internal Revenue, at Philadelphia, Pennsylvania.

2. The notice of claimed deficiency (copy of which is attached marked Exhibit A and made part hereof) was mailed to the petitioner on February 23, 1950 and alleges a deficiency in gift tax liability for the taxable year ending December 31, 1946 in the amount of $14,250., and a deficiency in gift tax liability for the taxable year ending December 31, 1947 in the amount of $43,762.50.

3. The determination of tax contained in said notice of claimed deficiency is based upon the following errors:

(a) In determining the tax liability of petitioner for the year 1946 the Commissioner erroneously increased the valuation of the property, subject of gift, described in Schedule A, Item 3, of petitioner's gift tax return for the year 1946 from $50,000. to $100,000. resulting in claimed deficiency of gift tax of $13,875., the amount of deficiency in dispute ($14,250. less $375. otherwise claimed).

The Commissioner's valuation of $100,000. is $50,000. in excess of the fair market value as of the date of gift, October 2, 1946, and is therefore wholly unwarranted.

(b) In determining the tax liability of petitioner for the year 1947 the Commissioner erroneously in-

creased the valuation of the property, subject of gift, described in Schedule A, Item 3, of petitioner's gift tax return for the year 1947 from $121,000. to $240,000. and erroneously adjusted the Computation of Tax, Item 2, of the return, whereby the total net gifts for preceding years was erroneously increased by $50,000., the amount of increase in the valuation of the 1946 gift, these adjustments resulting in a claimed deficiency of gift tax of $43,162.50, the amount of deficiency in dispute ($43,762.50 less $600. otherwise claimed).

The Commissioner's valuation of $240,000. is $119,000. in excess of the fair market value as of the date of gift, July 16, 1947, and is therefore wholly unwarranted.

4. The facts upon which the petitioner relies as the basis of her appeal are as follows:

(a) The amount of $50,000. declared in the 1946 gift tax return was the true and fair market value on October 2, 1946, the date of the gift, of the property described in Schedule A, Item 3: One marquis diamond weighing 20.5 carats, mounted in irridium platinum setting with two tapered bullet shaped diamonds. The Commissioner's valuation of $100,000. is $50,000. in excess of the fair market value and is therefore wholly unwarranted.

(b) That of the claimed deficiency in gift tax for the year 1946, $13,875. thereof has resulted from the Commissioner's erroneous and improper valuation of the gift described in Schedule A, Item 3 of petitioner's return.

(c) The amount of $121,000. declared in the 1947 gift tax return was the true and fair market value on July 16, 1947, the date of the gift, of the property described in Schedule A, Item 3: One 33.45 carat gem emerald cut diamond set in ring and pair of marquis

diamond earclips, .56 carat. The Commissioner's valuation of $240,000. is $119,000. in excess of the fair market value and is therefore wholly unwarranted.

(d) The Commissioner's erroneous and improper valuation of the 1946 gift resulted in an improper increase in the total net gifts for preceding years in the 1947 return and thus further increased the amount of claimed deficiency in gift tax for the year 1947.

(e) That of the claimed deficiency in gift tax for the year 1947, $43,162.50 thereof has resulted from the Commissioner's erroneous and improper valuation of the gift described in Schedule A, Item 3 of petitioner's return and the improper adjustment of Computation of Tax, Item 2 of the 1947 return, whereby the total net gifts for preceding years was increased by $50,000., the amount of the erroneous increase in valuation of the 1946 gift.

Wherefore, petitioner prays this Court may hear this appeal and determine:

(1) That there is no deficiency in gift tax due by petitioner for the year 1946 in excess of $375.;

(2) That there is no deficiency in gift tax due by petitioner for the year 1947 in excess of $600.;

(3) That the Court may grant such other and further relief as the nature of the case may warrant.

/s/ Rose Publicker,
Petitioner.

/s/ Earl Jay Gratz,
J. Maurice Gray,
Earl Jay Gratz,
Attorneys for Petitioner,
1421 Chestnut Street,
Philadelphia 2.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

ROSE PUBLICKER, being duly sworn according to law, deposes and says that she is the petitioner above named; that she has read the foregoing petition and is familiar with the statements contained therein and that the facts stated therein are true.

/s/ ROSE PUBLICKER.

Sworn to and subscribed before me this 17th day of May, 1950.

/s/ SARAH MCGARVEY,
(SEAL) *Notary Public.*
My Commission Expires February 1, 1953.

EXHIBIT "A."

FIRST DISTRICT PENNSYLVANIA.

FEB 23 1950

CONF.

Mrs. Rose Publicker,
1429 Walnut Street
Philadelphia 2, Pennsylvania.

Dear Mrs. Publicker:

You are advised that the determination of your gift tax liability for the calendar years 1946 and 1947, discloses a deficiency of $14,250.00 for the year 1946 and a deficiency of $43,762.50 for the year 1947, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within ninety days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

Geo. J. Schoeneman,
Commissioner,
By (Signed) Leslie R. Miles,
Internal Revenue Agent in Charge.

Enclosures:
Statement
Form of Waiver 890-A
Form 1276

BMN/mas

STATEMENT

Mrs. Rose Publicker, Donor
1429 Walnut Street
Philadelphia 2, Pennsylvania.

Gift Tax Liability for Calendar Years
1946 and 1947.

Year	*Liability*	*Assessed*	*Deficiency*
1946	$162,504.98	$148,254.98	$14,250.00
1946	234,294.22	190,531.72	43,762.50

In making this determination of your gift tax liability, careful consideration has been given to the report of examination, copy of which was forwarded to you on September 13, 1949; to your protest dated October 10, 1949; and to the statements made at conference held January 19, 1950.

A copy of this letter and statement has been mailed to your representative, Mr. Earl Jay Gratz, 1421 Chestnut Street, Philadelphia 2, Pennsylvania, in accordance with the authority contained in the power of attorney executed by you and on file with this office.

The deficiencies result from the following adjustments:

Adjustments to Net Gifts
Year 1946

Schedule A of Return:	*Returned*	*Determined*
Total gifts—1946	$1,363,175.00	1,413,175.00
Loss: Exclusions	15,000.00	15,000.00
Amount of gifts included	1,348,175.00	1,398,175.00
Less: Deduction for charitable gifts	776,175.00	776,175.00
Net gifts—1946	$572,000.00	622,000.00

Explanation of Adjustments

SCHEDULE A of Return:	*Returned*	*Determined*
Item 3—Marquis diamond	$50,000.00	100,000.00
Increase	50,000.00	
	$100,000.00	

This item has been included at its fair market value as determined upon consideration of all the available evidence.

Computation of Gift Tax
Year 1946

	Returned	*Determined*
Net gifts, for the year 1946	$572,000.00	622,000.00
Total net gifts for preceding years	320,666.10	330,666.10
Total net gifts	892,666.10	952,666.10
Tax on total net gifts	214,489.84	231,139.84
Less: Tax for preceding years	66,234.86	68,634.86
Tax on net gifts for 1946	148,254.98	162,504.98
Gift tax liability for 1946 corrected		162,504.98
Gift tax liability disclosed by return		148,254.98
Deficiency in Gift Tax for 1946		$14,250.00

ADJUSTMENTS TO NET GIFTS
Year 1947

SCHEDULE A of Return:	*Returned*	*Determined*
Total gifts—1947	$648,620.00	767,620.00
Less: Exclusions	15,000.00	15,000.00
Amount of gifts included	633,620.00	752,620.00
Net Gifts—1947	$633,620.00	752,620.00

Explanation of Adustments

SCHEDULE A of Return:	*Returned*	*Determined*
Item 3—Diamond ring and Ear clips	121,000.00	240,000.00
Increase	119,000.00	
	$240,000.00	

These items have been included at their fair market value as determined upon consideration of all the available evidence.

Computation of Gift Tax
Year 1947

	Returned	*Determined*
Net gifts, for the year 1947	633,620.00	752,620.00
Total net gifts for preceding years	892,666.10	952,666.10
Total net gifts	1,526,286.10	1,705,286.10
Tax on total net gifts	405,021.56	465,434.06
Less: tax for preceding years	214,489.84	231,139.84
Tax on net gifts for 1947	190,531.72	234,294.22
Gift Tax liability for 1947 corrected		234,294.22
Gift Tax liability disclosed by return		190,531.72
Deficiency in Gift Tax for 1947		$43,762.50

ANSWER.

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.

2. Admits the allegations of paragraph 2 of the petition.

3. (a) Denies the allegations of paragraph 3 (a) of the petition.

UNNUMBERED PARAGRAPH, lines 7 to 9, inclusive, page 2. Denies the allegations of the UNNUMBERED PARAGRAPH appearing on lines 7 to 9, inclusive, at page 2 of the petition.

(b) Denies the allegations of paragraph 3 (b) of the petition.

UNNUMBERED PARAGRAPH, lines 20 to 22, inclusive, page 2. Denies the allegations of the UNNUMBERED PARAGRAPH, appearing on lines 20 to 22, inclusive, at page 2 of the petition.

4. (a) to (e) Denies the allegations of paragraphs 4 (a) to (e), inclusive, of the petition.

5. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the relief sought in the petition be denied.

(Signed) CHARLES OLIPHANT,
CRJ
CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel,

HARTFORD ALLEN,
Division Counsel.
WILLIAM D. HARRIS,
Attorney,
Bureau of Internal Revenue.

STIPULATION OF FACTS.

It is hereby stipulated with respect to the above entitled proceeding that the following statements may be accepted as facts, and that this stipulation shall be without prejudice to the right of either party to object to the admission of such facts solely upon the grounds of relevancy and materiality and without prejudice to the right of either party to introduce other and further evidence at the trial of this case not inconsistent with the facts herein stipulated.

1. The property, subject of gift, described in Schedule A, Item 3 of petitioner's gift tax return for the year 1946 was one marquise diamond weighing 20.5 carats, mounted in iridium platinum setting with two tapered bullet shaped diamonds.

2. The date of gift described in Paragraph 1 hereof was October 2, 1946.

3. Petitioner purchased the property, subject of gift, described in Paragraph 1 hereof, April 9, 1941 for a price of $45,000., plus $4,500. Federal excise tax.

4. The property, subject of gift, described in Schedule A, Item 3 of petitioner's gift tax return for the year 1947 was one emerald cut diamond weighing 33.45 carats, set in ring, and pair of marquise diamond earclips.

5. The date of gift described in Paragraph 4 hereof was July 16, 1947.

6. Petitioner purchased the property, subject of gift, described in Paragraph 4 hereof, February 5, 1947 for a price of $200,000., plus $40,000. Federal excise tax.

7. The following exhibits are submitted as part of this Stipulation of Facts:

(a) Gift Tax Return, Form 709, for the calendar year 1946, of the petitioner, marked "Exhibit 1-A" (Photostatic copy).

(b) Gift Tax Return, Form 709, for the calendar year 1947, of the petitioner, marked "Exhibit 2-B" (Photostatic copy).

EARL JAY GRATZ,
Earl Jay Gratz,
Counsel for Petitioner.
CHARLES OLIPHANT,
J&R
Charles Oliphant,
Chief Counsel,
Bureau of Internal Revenue.

Exhibit 1-A

1st Ex 408

UNITED STATES
GIFT TAX RETURN
CALENDAR YEAR 19[illegible]

MAR 15 1947

Name of donor: Ione Publicker

Address: 1429 Delmut St., Phila., Pa

Citizenship: Citizen of United States

Residence: Philadelphia, Pa.

During the calendar year indicated above, without an adequate and full consideration in money or money's worth, did you transfer (according $3,000 in value (or expenditure of value if a future interest) as follows? (Answer "Yes" or "No.")

a. By the creation of a life insurance policy (No.) or the payment of a premium on a previously issued policy (No.); the proceeds of which are payable upon your death to or for the benefit of your estate or to or for the benefit of your executor or executrix, administrator or administratrix, assignee or assignees, or beneficiary or beneficiaries, or by the relinquishing every such power that was reserved in a previously issued policy (No.).

b. By exercising, releasing, or relinquishing a power (over a trust fund) which was described by you (No.).

c. By exercising option to withdraw funds from a trust fund which was described by you (No.).

d. By exercising title to another and yourself as joint tenants or by going with or husband and husband as tenants by the entirety (No.).

e. By the exercise or release of a power of appointment, except as provided in subparagraph (1) and (2) of section 2 of the instructions (No.).

f. By exercising community property to purchase or by surrendering community property (including property acquired by your spouse or him a beneficiary by the exercising of powers of and spouse in your spouse's property), to the extent of your interest in property acquired by the gift as set forth in section 2 of the instructions (No.).

g. By any other method, direct or indirect (Yes.).

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

RECEIVED
OCT 2 1947

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Total amount of gifts for year (Item c, schedule A)		$ 1,348,175.00
2. Total deductions for charitable, public, and similar gifts for year (Item c, schedule B)	$ 776,175.00	
3. Specific exemption claimed (see section 11 of instructions)		776,175.00
4. Total deductions (Item 2 plus Item 3)		
5. Amount of net gifts for year (Item 1 minus Item 4)		$ 572,000.00

COMPUTATION OF TAX (see section 15 of instructions)

1. Amount of net gifts for year (Item 5, above)		$ 572,000.00
2. Total amount of net gifts for preceding years (Item c, schedule C)		320,666.10
3. Total net gifts (Item 1 plus Item 2)		$ 892,666.10
4. Tax computed on Item 3		214,869.84
5. Tax computed on Item 2		66,234.96
6. Tax on net gifts for year (Item 4 minus Item 5)		$ 148,254.88

RECEIVED
MAR 24 1947
GIFT TAX

AFFIDAVIT OF PERSON FILING RETURN

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

Sworn to and subscribed before me this 15th day of March, 19 47

Joseph Lanotte

Ione Publicker
(Signature of donor (executor) (other person))

1429 Delmut St., Phila. 2, Pa.
(Address of person filing return)

AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

Sworn to and subscribed before me this 11th day of March, 19 47

Bradley D. Byers

Alfred C. Bramhall
(Signature of person preparing return)

Certified Public Accountant (Person)
(Address of person preparing return)
for JOHN HEINS & CO.

By [illegible]

Extract of Exhibit 1A 15a

SCHEDULE A—Total Gifts During Year (see sections 5, 6, 7, 8, 9, 10, 11, and 16 of instructions)

Item No.	Description of gift, and donee's name and address	Donee's relationship to donor	Value at date of gift
	Schedule attached		$ 2,141,333.33
(a) Total			$ 2,141,333.33
(b) Less total exclusions not exceeding $3,000 for each donee (except gifts of future interests)			
(c) Total included amount of gifts for year			$ 2,141,333.33

SCHEDULE B—Deductions for Charitable, Public, and Similar Gifts During Year (see sections 10 and 16 of instructions)

Item No.	Name and address of donee, and character of institution	Value at date of gift
(1)	Item 6 - Schedule A	$ 700.
(2)	" 7 - " "	
(3)	" 8 - " "	4.
(a) Total		$ 704.
(b) Less total exclusions not exceeding $3,000 for each donee (except gifts of future interests)		
(c) Total deductions for charitable, public, and similar gifts for year		$ 704.

SCHEDULE C—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (Subsequent to June 6, 1932)

Calendar year	Collection district in which prior return was filed	Amount of specific exemption	Amount of net gifts
[illegible]	Philadelphia, Pennsylvania	$ 50,000.00	$ 300,666.10
(a) Totals for preceding years (without adjustment for reduced specific exemption)		$ 50,000.00	$ 300,666.10
(b) Amount, if any, by which total specific exemption, line a, exceeds $50,000 (see section 14 of instructions)			20,000.00
(c) Total amount of net gifts for preceding years (total, last column, line a, plus amount, if any, line b)			$ 320,666.10

(If more space is needed, attach additional sheets of same size)

Extract of Exhibit 1A

EXTRACT OF EXHIBIT 1A.

ROSE PUBLICKER

1946 Gift Tax Return
Schedule A — Total Gifts during Year

Item No.	Description of Gift and Donee's Name and Address	Date of Gift	Value at Date of Gift
	• • •		
(3)	One marquis diamond weighing 20.5 carats, mounted in irridium platinum setting, with two tapered bullet shaped diamonds to Helen P. Neuman, Inver House, Wayne, Pa. (Appraisal of Harry Winston, Inc. attached to original of this return)	10/2/46	50,000.00
	• • •		

HARRY WINSTON, INC.
Precious Stones
Seven East Fifty-First Street
New York 22

October 2, 1946

Mrs. Harry Publicker
1429 Walnut Street
Philadelphia 2, Pennsylvania

My dear Mrs. Publicker:

We have examined your Marquis Diamond Ring containing:—

One Large Marquis Diamond approximately 20.5 Cts.
2 Tapered Bullet-Shape Diamonds
Irridium Platinum Setting

This is to advise you that the present wholesale ready market value of this ring is $50,000.00.

Very truly yours,

HENRY K. BEYER
Henry K. Beyer

HKB:es

UNITED STATES

GIFT TAX RETURN

CALENDAR YEAR 1947

RECEIVED
MAR 15 1948
Phila. 10 Pa. Int. Rev.

Donor: Rose Publicker
Address: (Number and street) 1429 Walnut Street, Phila. Pa. (Municipality)
Citizenship: U. S. A.
Residence: Merion, Pa.

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer constituting a gift in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No.")

a. By the creation of gifts because solely [illegible] No.
b. By the payment of a premium on a [illegible] No.
c. By the exercise or release of a power of appointment [illegible] No.
d. By the creation, exercise or release of a power over a trust [illegible] No.
e. By the conversion of gifts because solely [illegible] No.
f. By the exercise of options to purchase or [illegible] No.
g. By the assignment, release, or [illegible] No.
h. By any other [illegible]

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Total included amount of gifts for year (Item 4, schedule A)	$ 633,620
2. Total deductions for charitable, public, and similar gifts for year (Item 4, schedule B)	$
3. [illegible] (Section 11 of instructions)	
4. [illegible]	
5. [illegible]	$ 633,620

COMPUTATION OF TAX (see section 12 of instructions)

6. [illegible] (Item 5, above)	$ 633,620
7. Computation of net gifts for preceding periods (Item 4, schedule C)	892,666
8. Total net gifts (Item 5 plus Item 7)	$ 1,526,286
9. Tax computed on Item 8	405,081
10. Tax computed on Item 7	214,489
11. [illegible] (Item 9 minus Item 10)	$ 190,531

FILED-PHILA.
MAR 15 1948

AFFIDAVIT OF PERSON FILING RETURN

I swear (or affirm) that this return, including the accompanying schedules and statements, to which I have subscribed my name, has been examined by me, and to the best of my knowledge and belief, it is true, correct, and complete. Except for the schedules of gifts which I have prepared in accordance with the Federal gift tax law and regulations, and on property reported by me for which I have furnished information to my tax counsel, I have prepared no part of this return and am not familiar with the gifts made by the donor. All gifts made by me (the donor) during the calendar year are listed in the schedules of this return. A true audit by me (the donor) during said calendar year.

Sworn to and subscribed before me this 12th day of March, 1948

Rose Publicker
(Signature of donor, executor, or other person)
1429 Walnut St., Phila. 2, Pa.
(Address of person filing return)

AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, is true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

Sworn to and subscribed before me this 12th day of March, 1948

Myles C. Bowker
(Signature of person preparing return)
Notary Public for resident (Parent)

Pd $190,531.72 - 3-15-48

Extract of Exhibit 2B 19a

SCHEDULE A—Total Gifts During Year (see instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of instructions)

No.	Description of gift, and donee's name and address	Date of gift	Value at date of gift
1 to 6	Separate schedule annexed	1947	$ [illegible]
	(a) Total		$ [illegible]
	(b) Less total exclusions not exceeding $3,000 for each donee (except gifts of future interests)		
	(c) Total taxable amount of gifts for year		$ [illegible]

SCHEDULE B—Deductions for Charitable, Public, and Similar Gifts During Year (see instructions 13 and 14 of instructions)

No.	Name and address of donee, and relationship of donor thereto	Value
		$
	(a) Total	$
	(b) Less total exclusions not exceeding $3,000 for each donee (except gifts of future interests)	
	(c) Total deductions for charitable, public, and similar gifts for year	

SCHEDULE C—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years

Calendar year	Description (number of return, where filed, whether filed or not)	Amount of specific exemption	Amount of net gifts
1935	Philadelphia, Pa	$ [illegible]	$ [illegible]
1946	Do.	[illegible]	[illegible]
	(a) Totals for preceding years (without adjustment for reduced specific exemption)	$ [illegible]	$ [illegible]
	(b) Adjustment, if any, by which total specific exemption, Item 6, column [illegible], was reduced (see section 454 of instructions)		
	(c) Total amount of net gifts for preceding years (total, but not more than $ [illegible] (see line 5)		$ [illegible]

(If more space is needed, attach additional sheet of same size)

Extract of Exhibit 2B 20a

ROSE PUBLICKER

1947 Gift Tax Return
Schedule A — Total Gifts during Year

Item No.	Description of Gift and Donee's Name and Address	Date of Gift	Value at Date of Gift
	• • •		
(3)	To Helen P Neuman, Inver House, Wayne, Pa One 33.45 carats Gem Emerald Cut Diamond Ring Pair of Marquise Diamond Earclips (.56 carat) (appraisal of Harry Winston, Inc attached to original of this return)	7/16/47	121,000

WAlker 5-0252 Established 1911

Sole Distributors of Kenp Watches

KOVITZ & PASHUTSKI
K. & P. Jewelry Co.
Wholesale Jewelers
127 Canal Street
New York 2, N. Y.

Diamonds
Watches
Jewelry
Silverware

APPRAISAL BILL

September 17th, 1947

M. J. Mangold
225 Broadway
New York City

1—Platinum diamond clip containing 22 marquise diamonds weighing 9 carat 60 points, 8 baguette diamonds weighing 1 carat 50 points, 1 pentagon diamond weighing 50 points, and 100 full cut round diamonds weighing 5 carat.

$6000.00

"GIFTS THAT LAST"

HARRY WINSTON, INC.
Precious Stones
Seven East Fifty-First Street
New York 22

July 8, 1947

Mr. J. Maurice Gray
1431 Chestnut Street
Philadelphia 2, Pa.

Dear Mr. Gray:

In response to your letter of July 7, 1947 I am pleased to furnish my opinion of the present fair market value of the 33.45 carat Gem Emerald Cut Diamond Ring and pair of Marquise Diamond Earclips owned by Mrs. Harry Publicker.

The Earclips could be sold for $6,000.00 in the present market. With regard to the Ring, this large Gem Emerald Cut Diamond is a very special stone due to its size and there are very few ready buyers who would purchase this stone outright. However, in my considered judgment, with some effort you may be able to procure $115,000.00 in the present market.

If you should desire any additional information I would be more than happy to comply.

Sincerely,

HARRY WINSTON, INC.
Harry Winston
President

EXCERPTS FROM PROCEEDINGS AT HEARING.

(9)* JOSEPH S. MILNER.

JOSEPH S. MILNER was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

(10) THE CLERK: State your name, please.

THE WITNESS: Joseph S. Milner.

DIRECT EXAMINATION.

By MR. GRATZ:

Q. Mr. Milner, have you stated your residence?

A. 728—business residence?

Q. No, your home residence first.

A. 5212 Gainor Road, Philadelphia.

Q. And your place of business?

A. At 728 Sansom Street.

Q. Philadelphia?

A. In Philadelphia.

Q. What business are you in?

A. In the diamond and jewelry business.

Q. And how long, Mr. Milner, have you been so engaged?

A. Over 30 years.

Q. And what is the name of your concern?

A. The House of Milner.

Q. Do you say that you buy, sell, and otherwise deal in diamonds?

A. Yes, we do.

Q. And during this period of over 30 years, has that been true?

A. Yes, that is true.

Q. Continuously?

---

*Figures in parentheses refer to page numbers of typewritten transcript of testimony.

(11) A. Continuously.

Q. And in what markets and where do you buy and sell in diamonds?

A. Mostly country-wide, and occasionally Europe as well. Both buy and sell.

Q. Well, now when you use the expression "country-wide," do you mean by that nationally?

A. Nationally.

Q. And are you familiar also, or do you buy and sell also, in the Philadelphia and New York markets?

A. Mostly.

Q. And has that been so throughout your business career of 30 years?

A. More so within the last 20 than the early 10.

Q. It has been stipulated as a fact in this record that the following diamonds or jewelry was given by the taxpayer in the year 1946, specifically the date of gift was October 2, 1946. The description of the diamond is as follows. One marquis diamond, weighing 20.5 carats, mounted in iridium platinum setting, with two tapered bullet-shaped diamonds.

Mr. Milner, did you and do you have a familiarity with that diamond that I have just described?

A. Yes, I do.

Q. Did you effect the sale of that diamond,—without (12) detail, I am asking you for no detail—but did you effect the sale of that diamond to the petitioner, Mrs. Publicker?

A. Yes, I did.

Q. And at the time that you sold it, was it of that description, as I have read it?

A. Yes, it was.

Q. Taking the date of gift as October 2, 1946, are you able to form an opinion—and the answer to this question would be yes or no—are you able to form an opinion as to the fair market value of the diamond ring that I have just described?

A. Yes.

Q. As of October 2, 1946 on that date?

A. Yes.

Q. Will you state to His Honor, Mr. Milner, what the fair market value was of that marquis diamond weighing 20.5 carats, mounted in iridium platinum setting, with the two tapered bullet-shaped diamonds, on October 2, 1946, bearing in mind that the fair market value has been defined to be at what price that property would change hands between a willing seller and a willing buyer, neither being under any compulsion to buy or to sell, and acting with the knowledge of the facts involved?

A. It would be difficult to include the mounting of that thing, and if that were excluded, and you discussed the (13) value of the diamond, the diamond itself, I would say the right market value would be at about $2,200 to $2,250 per carat.

Q. And if we took the larger amount that you have given of $2,250 per carat, you would multiply that, would you, by the 20.5 carats?

A. By 20.5 carats, that is correct.

Q. My calculations show that that would be $46,125. Is that in accord with yours?

A. That would be about right. I didn't make the calculation, but that is close enough to be in line.

Q. Now what would be the value of the fair market value on that date, October 2, 1946, of the two tapered bullet-shaped diamonds that were part of that mounting?

A. My memory isn't nearly as clear on that, since I don't remember their actual size. But their maximum value would vary from as low as $300 to as high as $500.

Q. The maximum then would be $500?

A. That is right.

THE WITNESS: For both of them.

THE COURT: For both of them or each?

By Mr. Gratz:

Q. And, if you can, will you state the valuation as of October 2, 1946, of the platinum setting or mounting in which the stone was?

(14) A. Entirely negligible. $25—you mean the mounting itself, the metal itself?

Q. Yes.

A. A maximum of $25.

Q. Now then, with respect to a gift made by the petitioner taxpayer in the year 1947, it has been stipulated as a fact into this record, and you may so accept it, that the description of that gift was as follows: One emerald cut diamond weighing 33.45 carats, set in iridium, and a pair of marquis diamond ear clips.

I now ask you, Mr. Milner, whether you did, at my instance, examine that emerald cut diamond weighing 33.45 carats, set in the ring?

A. I did.

Q. Did you have anything to do with selling that ring or did you sell that ring?

A. I did not sell it.

Q. So that that was not sold by you?

A. No.

Q. And when did you make the examination?

A. A couple of months ago.

Q. Where?

A. At my place of business, at 728 Sansom Street.

Q. In Philadelphia?

A. In Philadelphia.

(15) Q. And did you also make a physical examination of the pair of diamond ear clips?

A. Yes, I did.

Q. And so as to save time, you made that examination this morning, did you not?

A. That is correct.

Q. Now it has been stipulated as a fact in this record that the date of gift of the property which I have just de-

scribed, the ring and the ear clips, was July 16, 1947. I therefore ask you whether, bearing in mind the definition of value that we have heretofore stated, first whether you are able to form an opinion of the fair market value of that property on July 16, 1947?

A. Yes.

Q. And will you state to His Honor, please, your opinion of the fair market value on July 16, 1947, first, of the diamond weighing 33.45 carats set in iridium?

A. The diamond itself——

Q. Without my repeating the other qualifications that are necessary, and stating that value.

A. The diamond itself is an extremely beautiful one, weighing about 33.5 carats, and valued at about $3250 per carat.

Q. Is that your statement of the fair value, market value, as of July 16, 1947?

(16) A. That is correct.

Q. $32——

A. ——50 per carat.

Q. According to our calculations here, that would come for the sum of 33.45 carats to $108,712.50?

A. That seems about right.

Q. Does that accord with your valuation?

A. Yes. Now the mounting on that——

Q. The mounting, what would be the value of the mounting?

A. The mounting would be worth approximately $300.

Q. And that is as of July 16, 1947, the fair market value, $300 for the mounting?

A. That is correct.

Q. Which would take it roughly, then, to $109,000?

A. Yes, that would make it about right.

Q. And that is the fair market value as of July 16, 1947, of the ring?

A. That is correct.

Q. As you examined it still in the condition of a ring, mounting?

A. That is right.

Q. All right. Now will you state to His Honor the fair market value of the diamond ear clips, the pair of ear clips, that you examined, stating the value as of July 16, (17) 1947 in accordance with the definition heretofore given?

A. About $5,500.

Q. Is it your opinion, then, that the aggregate fair market value of the gift given in 1947 on the date of gift was approximately $114,500?

A. That is about correct.

MR. GRATZ: You may inquire.

CROSS-EXAMINATION.

By MR. HICKEY:

Q. Mr. Milner, did you state that you engage in both the retail business of buying and selling diamonds and the wholesale business?

A. That is correct.

Q. Approximately how much of your business is done in the retail trade?

A. About 35 per cent retail and about 65 or perhaps you had better figure 25 and 75. We have never kept actual records of it.

Q. Approximate is enough.

A. Yes.

Q. Since the date 1940, how many large diamonds over 10 carats have you handled in your store?

A. I have handled hundreds.

Q. You have handled large diamonds?

A. Of above 10 carats.

(18) Q. How many have you handled above 15?

A. Over what period of time?

Q. 1940 to the present time.

A. You mean over the period of my 30 years or for the last 10 years?

Q. No, sir, over the last 10 years, since 1941 to 1951.

A. I would say easily about the same, not quite as many. I never thought of it that way. Perhaps 100 stones of that size.

Q. 100?

A. Yes.

Q. Did you handle that last hundred in your wholesale capacity or your retail capacity?

A. Once I have handled them I don't recognize the differential.

Q. I mean, sir, you had 100 stones of over 15 carats pass through your hands?

A. Yes.

Q. Now how many of those stones did you sell in the retail market?

A. Of above 15 carats?

Q. Yes, above 15 carats.

A. Very, very few.

Q. About how many?

A. Perhaps 10 over the entire period.

(19) Q. Have you ever handled any other stones the size of 20 carats?

A. Yes.

Q. In the last 10 years?

A. Yes. I would like for you to define the word "handled," because I don't know whether you mean whether I have held them. I may have held hundreds of stones otherwise.

THE COURT: He means sold them.

THE WITNESS: You mean sold them?

MR. HICKEY: Yes. I will withdraw that question and restate it in another manner.

By Mr. Hickey:

Q. How many stones did you sell in the retail market of over 20 carats in the last 10 years?

A. Not one. Of above 20 carats?

Q. Yes.

A. With the exception of this one——

Mr. Gratz: May we show that by "this one," you mean——

The Witness: The marquis diamond. This one marquis diamond is 20.5 carats.

The Court: When was that sold?

The Witness: In about 1941, I believe. About 1941.

Mr. Hickey: That is approximately correct, Your Honor.

(20) By Mr. Hickey:

Q. You have never sold a diamond in the retail market as large as 30 carats in the last 10 years?

A. In the last 10 years?

Q. Yes, sir.

A. Yes, I believe we sold one weighing close to 30 carats.

Q. What date was that, sir?

A. Approximately 10 years ago.

Q. Now I will fix that date at about 1941.

A. That would be all right, sir.

Q. During the period from 1941 to 1946, was there a change in the jewelry market, the retail market?

A. In the general jewelry?

Q. I will withdraw that question. In the market, in the retail market, for large stones of over 15 carats, was there any change between the period of 1941 to 1946?

A. Yes, there is constantly fluctuating change in prices.

Q. Was there a general trend for the prices to rise or to fall?

A. More so to rise than to fall.

Q. Could you estimate about how much the market has increased for precious stones of over 15 carats between 1941 and 1946?

(21) A. Not too great. It could vary, depending upon the availability or accessibility of the diamond to as much as 10, 15, 20 per cent.

Q. And a 20 per cent increase?

A. Yes, it could vary to such an extent.

Q. How much did you sell a 20-carat diamond—it has been stipulated that the 20-carat diamond——

MR. GRATZ: That is objected to because it has not been admitted as relevant, sir, and I think that is my objection.

MR. HICKEY: Your Honor, I believe that the cost is always relevant in determining fair market value.

THE COURT: I am going to overrule your objection, Mr. Gratz.

MR. GRATZ: Will your Honor grant me an exception?

THE COURT: I will note your exception. I think probably it is relevant to show what price is charged for this diamond, the diamond that was sold in 1941.

By MR. HICKEY:

Q. It has been stipulated that that price was $45,000 plus $4,500 in Federal excise tax?

A. That is correct.

THE COURT: In other words, these amounts that you have given here do not include the excise tax which the purchaser has to pay when he buys a diamond. I believe that the (22) gentleman mentioned that the price was $45,000 plus $4,500 tax. Is that correct, Mr. Hickey?

MR. HICKEY: Yes, sir, that is correct.

THE COURT: So that would increase the cost of the diamond to the purchaser from $45,000 to $49,500?

THE WITNESS: It would increase the price that the customer paid for the diamond.

THE COURT: And he has to pay that tax to the seller of the diamod?

THE WITNESS: He has to pay that tax to the seller of the diamond. Yes, that is correct.

THE COURT: I just wanted to get that fact into the record.

By MR. HICKEY:

Q. In giving your opinion as to the fair market value of the 20-carat diamond on the date of gift, did you take into consideration the Federal excise tax? Did you give a fair market value before or after the Federal excise tax?

A. In placing value——

MR. GRATZ: One moment, please. May it please the Court, I want to note on the record an objection to that question because I do not think it is relevant as to what tax might have been imposed on the value once the value has been ascertained.

THE COURT: That is for the Court to determine, Mr. (23) Gratz, whether or not that is a part of the fair market value. Your objection will be overruled. I will permit the witness to answer.

MR. GRATZ: And may I also call to the Court's attention that the amount of tax varied. Your Honor will observe that in 1941 the excise tax was only at the amount of 10 per cent. My friend has not included in his question what the amount of excise tax was in October, 1946, at the time of the gift, or July 16, 1947, the time of the second gift.

By Mr. Hickey:

Q. First, would you please answer the question whether or not, in giving your opinion as to the fair market value of the 20-carat diamond on October 2, 1946, you did or did not take into consideration the Federal excise tax?

Mr. Gratz: I need not renew my objection, sir.

The Court: No.

The Witness: It would not be taken into consideration by me.

By Mr. Hickey:

Q. In giving your opinion, you did not take it into consideration, you did not include it in the amount of——

A. No, I did not.

The Court: Is that true in regard to the other diamond, the one that you appraised at $114,000?

(24) The Witness: Yes, that is true of the other diamond, too.

The Court: No excise tax was taken into consideration?

The Witness: Into consideration.

By Mr. Hickey:

Q. Have you sold Mrs. Publicker any other jewelry besides the 20-carat diamond in the last 10 years?

Mr. Gratz: That is objected to, may it please the Court. It is wholly irrelevant.

Mr. Hickey: I think it is relevant, in determining the extent of the interest——

The Court: The objection will be overruled, Mr. Gratz. If it is irrelevant, I can always disregard it.

Mr. Gratz: I do not know the answer to it myself, sir. But I objected merely because I felt that it was an improper question.

THE WITNESS: I would have to go back to my records to ascertain that, and it is possible that we have sold them some additional jewelry, but nothing of any substantial value.

By MR. HICKEY:

Q. I ask you whether you ever appraised the 20-carat stone for Mrs. Publicker?

A. Yes, I did.

Q. Do you recall the amount at which you appraised (25) that stone?

A. I believe it was about $65,000.

Q. Do you recall the approximate date at which you made that appraisal?

A. Generally following a sale of that size, perhaps within a day, two, or a week from the date of sale.

Q. Approximately April 9, 1941. That would be an approximate date?

A. Yes, I would say so. You understand, of course, that that appraisal is no indication of value.

Q. What is the reason for giving the appraisal?

A. Generally for insurance purposes for the protection of a client in case they had to replace quickly the item that was lost.

Q. Is it necessary that it be replaced quickly? Is that a factor taken into consideration in the appraising of it?

A. I would think so.

Q. Under the terms of the request written to you by the insurance company for an appraisal, is that written down?

A. I have never had such a request from an insurance company.

Q. Is it customary for the owner of a diamond, in requesting an appraisal from you, to require that you fix the appraisal value, taking into consideration the need for quickly (26) replacing the stone?

A. Not required, but generally suggested by myself in serving my customers.

Q. Did you act as an agent in fact or helper to Mrs. Publicker in purchasing the 33-carat diamond?

A. No, not as an agent, no.

Q. Did you recommend that Mrs. Publicker go to Mr. Winston and purchase the stone?

A. I most assuredly did not.

Q. Did you see the diamond, the 33-carat diamond, before Mrs. Publicker purchased it?

MR. GRATZ: If it please the Court, that is objectionable. I think the other two questions were objectionable. I did not want to intrude at each point.

THE COURT: I do not see the bearing it has.

MR. HICKEY: I think I can perhaps relate it to the fair market value if I am permitted to continue for a few minutes. Otherwise, I will withdraw the question.

MR. GRATZ: I object to its lack of relevancy, sir.

THE COURT: The objection will be overruled. Proceed.

By MR. HICKEY:

Q. Did you examine the 33-carat diamond before Mrs. Publicker purchased it?

A. No, I did not.

(27) Q. Did you examine it soon after, in the general period?

A. No, I did not.

Q. It has been stipulated that the cost of the 33-carat diamond on February 5, 1947——

MR. GRATZ: Before you state the amount, may I interject an objection because again we object to the cost of that stone. We contend that the issue before the Court here is the value as of the date of gift. And while it is true that it has been stipulated, it has been

stipulated subject to our objection at this time as to its relevancy and materiality.

THE COURT: The objection will be overruled. Your exception will be noted.

By MR. HICKEY:

Q. I will repeat the question for the sake of clarity. It has been stipulated in paragraph 6 that the petitioner purchased the 33-carat diamond on February 5, 1947, for the price of $200,000, plus $40,000 in Federal excise tax. It was approximately five months before the date of the gift.

Is it your opinion that in that period of time the market dropped to the amount of approximately $108,000?

A. It most assuredly did not drop, but I don't know what was charged for it, and I don't know what the sale price of it was. But I have nothing to do with that.

(28) Q. You may accept as correct the fact that that price was paid, $240,000.

A. It is not for me to judge what someone else may charge for any item. I can't control that.

MR. HICKEY: No further questions, thank you.

RE-DIRECT EXAMINATION.

By MR. GRATZ:

Q. Mr. Milner, does the fact that someone may have sold to the petitioner this item of jewelry for $200,000 plus Federal excise tax paid by the buyer, through the seller, to the Federal Government, does that change in any way at all your stated opinion to this Court as to the true fair market value of that ring on July 16, 1947?

A. It assuredly does not.

Q. And will you state what, in your opinion, was the fair market value even at the time of purchase, in February, 1947, when the taxpayer may have paid $200,000 plus tax?

A. Not much difference than now.

Q. Than what?

A. Than the price in 1947.

Q. I am asking you will you state whether the fair market value on February 5, 1947, was the same as the value that you have stated to the Court as of July 16, 1947?

A. Yes.

Q. That is $114,500 for the property in question?

(29) A. That is correct.

Q. Regardless of what price may have been charged by whoever sold her the ring?

A. That is absolutely so.

RE-CROSS-EXAMINATION.

By MR. HICKEY:

Q. Are you familiar with the reputation of Mr. Winston in the field of selling and buying diamonds?

MR. GRATZ: May I have the question?

(The pending question was read by the reporter.)

THE WITNESS: Yes, I know his general reputation.

By MR. HICKEY:

Q. Could you tell me whether or not Mr. Winston is regarded as being one of the foremost dealers in large stones?

A. Yes, he is.

Q. Has he a reputation in the trade of being an honest and reliable dealer?

A. I would rather not answer that.

MR. HICKEY: No further questions.

RE-DIRECT EXAMINATION.

By MR. GRATZ:

Q. Did you know that Mr. Winston himself had signed a valuation stating that the value of the ring that he sold in February, 1947, was, in fact, on July 16, 1947, worth only $116,000?

(30) A. No, I did not.

Q. Which is roughly about $2,000 from your valuation.

MR. HICKEY: Would the court reporter please repeat that question?

(The question was read by the reporter as follows:

"Question: Did you know that Mr. Winston himself had signed a valuation stating that the value of the ring that he had sold in February, 1947, was, in fact, on July 16, 1947, worth only $116,000?")

MR. HICKEY: I move to strike that question as hearsay, Your Honor.

MR. GRATZ: May it please the Court, it is part of the record here, it is attached to the return for the year 1947.

THE COURT: The objection will be overruled.

MR. HICKEY: No further questions, thank you.

(Witness excused.)

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(32) JOHN A. SOMMER, was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: John A. Sommer.

DIRECT EXAMINATION.

By MR. GRATZ:

Q. Mr. Sommer, will you please state your residence?

A. 51 Continental Avenue, Forest Hills, Long Island.

Q. New York?

A. Yes.

Q. And your place of business, sir?

A. 608 Fifth Avenue, New York.

Q. And what is the name of the firm with which you are associated in New York?

A. Charles W. Sommer and Brother, Inc.

(33) Q. And are you an officer of that?

A. Yes, sir.

Q. And what is the business of your company?

A. Buying and selling and appraising of jewelry.

Q. Do you include in jewelry diamonds?

A. Yes.

Q. And how long have you personally been engaged in the buying and selling, and appraising, of diamonds?

A. Thirty years, approximately.

Q. How long has that firm with which you are associated been so engaged?

A. Forty years.

Q. And during the past thirty years in which you have been so engaged, have you had occasion to buy and sell diamonds in New York City?

A. Yes, sir.

Q. Elsewhere?

A. No, only in New York.

Q. Only in New York?

A. Personally. The firm has purchased diamonds in other cities, but myself personally only in New York.

Q. Well, has your firm bought and sold and dealt in diamonds other than in New York City?

A. Yes.

Q. Where?

(34) A. Well, from here to the Coast.

Q. Throughout the country?

A. Throughout the United States.

Q. And you have a knowledge of the market in diamonds, both in their purchase and sale and appraisal?

A. Yes.

Q. Mr. Sommer, did you, at the instance of the petitioner, the taxpayer, make an examination of a marquis

diamond weighing 20.5 carats that, under a stipulation of facts, was previously mounted in a platinum setting, but at the time of your examination may have been out of that setting? Did you make such an examination of that stone?

A. Yes.

Q. Did you make that examination on or about December of 1949?

A. December 17, 1949.

Q. And where did you make the examination?

A. In our office.

Q. In New York City?

A. New York City.

Q. And did you, Mr. Sommer, also make an examination on that date and at that place of the second item with which we are concerned in this case, an emerald cut diamond weighing 33.45 carats set in a ring?

A. Yes.

(35) Q. Together with a pair of diamond ear clips?

A. Right.

Q. Now this question, I believe, a preliminary question, should be answered either yes or no by you. Were you able to form an opinion of the fair market value of the first item of property, the diamond weighing 20.5 carats, as of October 2, 1946, the date of gift as stipulated in this case, and also to form an opinion of the fair market value of the diamond weighing 33.45 carats set in a ring as well as the pair of diamond ear clips, as of July 16, 1947?

A. Yes.

Q. In the stipulated date of gift——

MR. HICKEY: I object, Your Honor. I don't think the witness has yet been qualified to give an opinion as to the value of precious stones of sizes such as 20 carats and 33 carats.

THE COURT: Very well. I am going to overrule your objection. You have the right to cross-examine the witness. The witness has shown that he has been

in the business of buying and selling diamonds over a long period of years, and appraising, and so forth. So on your cross-examination you can inquire as to that particular type of diamond. Your objection will be overruled.

MR. HICKEY: Objection withdrawn, Your Honor.

By MR. GRATZ:

(36) Q. Continuing, then, with my question, Mr. Sommer, I want to add to it that, bearing in mind that by the use of the expression "fair market value" as of those two dates I will refer to that price at which the property would exchange hands between a willing seller and a willing buyer, neither under any compulsion to buy or sell, either one, and with a knowledge of the existing facts.

Now bearing all of that in mind, will you please answer in the affirmative or negative whether you were able to form an opinion as to the fair market value of those items on the respective dates given?

A. Yes.

Q. Will you state to His Honor, please, what, in your opinion, was the fair market value on October 2, 1946, of the marquis diamond weighing 20.5 carats? I want the fair market value on that day.

A. My total figure comes to $46,125. That is at the rate of $2,250 a carat.

Q. Now you do not include in your valuation, do you, and in your statement of the market value, the platinum setting in which that stone had been before you saw it, or the two tapered bullet-shaped diamonds which had been in part of that setting? I say you do not include that in your figure?

A. No, that is not included in that price.

(37) Q. And you did not see, I take it, the platinum setting or the two tapered bullet-shaped diamonds to which the previous witness testified?

A. No, the stone was loose when I saw it.

Q. Now will you state to His Honor your opinion of the fair market value of the emerald cut diamond weighing 33.45 carats set in ring, as of July 16, 1947, with the definition as I previously have given of value?

A. I put a value of $2,200 a carat on it, which amounts to $73,590.

Q. I now ask you the fair market value on July 16, 1947, of the diamond ear clips that you examined.

A. $5,000.

Q. Making the aggregate of the 1947, $78,590?

A. Correct.

MR. GRATZ: You may cross-examine.

CROSS-EXAMINATION.

By MR. HICKEY:

Q. Mr. Sommer, during the last ten years, how many stones of over 15 carats have you bought or sold? Approximate figures will be, of course, satisfactory.

A. Within the last ten years?

Q. Yes, sir, 1941 through 1951, will be satisfactory.

A. Well, two or three over 10 carats, but nothing over 15. The last big stone we sold was 25-carat marquis diamond (38) that was prior to that.

Q. Prior to 1941, sir?

A. Prior to 1941 we had sold a 25-carat marquis diamond.

Q. Can you give the sizes of some of the estates you have appraised in precious stones?

MR. GRATZ: If my friend will amend the question to cover the stones, I don't think the size of the estate would make any difference.

MR. HICKEY: Excuse me.

By MR. HICKEY:

Q. Is my question fair to the witness?

A. Yes.

MR. GRATZ: May it please the Court, I am bound to object because the size of the estate would not be relevant. The size of the stone might be.

THE COURT: I think you might amend your question and confine it to the size of the diamonds that he has examined, not to the size of the gross estate.

By MR. HICKEY:

Q. How many stones of over 15 carats have you appraised in the last ten years?

A. Not many, two or three.

Q. When you gave your opinion as to fair market value, were you giving the Court the fair market value in the (39) wholesale market or the retail market?

A. Well, I guess you would say it was the wholesale market, because that is the end of the business I am in.

Q. When you suggested approximately $72,600 as the value of the 33-carat emerald cut diamond, would you have advised a person to sell at that price on the date of gift, 7/16/47?

A. That I would advise them?

Q. Yes. If the owner had come to you and asked your opinion as to whether or not they should sell at that price, would you have answered yes or no?

MR. GRATZ: May I hear the question, please?

MR. HICKEY: Question withdrawn.

By MR. HICKEY:

Q. Did you take the excise tax into consideration?

A. No.

MR. HICKEY: No further questions.

RE-DIRECT EXAMINATION.

By MR. GRATZ:

Q. Mr. Sommer, may I clear one thing? You spoke of the fact that you were in the wholesale market and there-

fore had referred to the market value of the wholesale market. Will you tell His Honor whether or not there is a retail market for a stone of 20.5 or 33.5 carats, or what is the market, where is the market for stones of that size? (40) A. Well, you have to find a buyer.

Q. Well, can you speak of a retail market for stones of that size?

A. When we speak of a retail market, we think of what a consumer would pay for an article. That is the retail.

Q. But my question is: When you are dealing with stones of the size of 33.5 carats, what is the market for those stones? Is there a retail market as distinguished from a wholesale market, or is it a market among dealers in New York? Will you answer, please?

MR. HICKEY: Objection, Your Honor. I think the witness answered the question.

THE COURT: The witness may answer, Mr. Hickey, if he understands the question.

THE WITNESS: Will you put the question again, please?

By MR. GRATZ:

Q. When you speak of a stone of 33.5 carats, or even one of 20.5 carats, can you speak of a retail market for that kind of a stone, or is it a market among dealers in New York as the only market in which you can sell such a stone?

A. Well, I can only answer it the way I think it should be answered. If a dealer buys a stone, he expects to make a profit. Now, I don't know whether he is going to ask for a five per cent profit or a ten per cent profit or—he (41) will get, I presume, as much as he can.

Q. That is if a dealer took a stone of that size and held it for retail purposes, is that right?

A. Well, either way, either for resale or outright sale.

Q. All right. But when the expression "retail market" is used, can you speak of a retail market for the stones of

that size, or are they sold there with so few buyers that you can't speak of a retail market?

A. When you speak of retail, at least personally, I feel that is something that is sold to a consumer. I can't regulate the profit that anybody would ask on it. Some people might be satisfied, as I said, with just a quick turnover. Others might want a long profit, I don't know.

MR. GRATZ: I will not press the point further.

THE COURT: The Court wants some information here. I am not clear on your answers. The valuation that you have placed on those two diamonds as of the date about which inquiry was made, is that the valuation that your firm would have paid for those diamonds at that time?

THE WITNESS: At that time, yes.

THE COURT: Is that the valuation that you would have sold them for?

THE WITNESS: No. Naturally, we would expect a profit over what we paid for them.

(42) THE COURT: Well, can you give me some idea of what you would have charged a prospective purchaser as the price that you would have paid on those two stones to a prospective purchaser at that time?

THE WITNESS: Well, we work on a margin of 10 per cent.

THE COURT: You would have added 10 per cent to that price to the prospective purchaser. And in addition to that would you have added the excise tax?

THE WITNESS: Naturally.

THE COURT: What was the excise tax at that time?

THE WITNESS: I am not sure whether it was 10 or 20. 20, was it?

THE COURT: It is admitted for the purpose of the record that, on the date of both of these gifts, it was 20 per cent?

MR. GRATZ: I have not verified that, Your Honor, as to the year 1946 or 1947.

MR. HICKEY: I think it should be admitted for the record that at the date of both gifts the excise tax was 20 per cent.

MR. GRATZ: If my friend so states, I accept it.

THE COURT: Very well. You understand now that I am trying to merely get the picture. I am not attempting to say whether this excise tax was a part of the purchase price (43) or not. But I want to know the picture here because I am going to have to write an opinion in this case.

So that your dealer's profit and the excise tax would have been added to the figure that you have stated in making a sale to a prospective purchaser on that date?

THE WITNESS: Yes.

MR. GRATZ: Well, Your Honor, of course you will note that I have objected to this inclusion of excise tax. But Your Honor has previously ruled.

THE COURT: I understand that, and I am not ruling on whether or not it is included, but I want to know what it would be, if I find that it should have been incurred as a part of the retail value.

CROSS-EXAMINATION.

By MR. HICKEY:

Q. Would any other factors be added to the cost of the diamond after you acquired it? Would you add interest charges and carrying charges to the diamond?

A. No.

Q. Those expenses of your business would not be taken into consideration in raising the price of the diamond, in raising your asking price?

A. No.

Q. Then how would you pay those expenses if you did not recover them from the selling price?

(44) A. On stones of that size, we wouldn't hold on to them very long. We would sell them as quickly as possible.

Q. Where would you sell them, to what type of persons or businesses?

A. Well, to——

MR. GRATZ: He has already answered that a consumer would buy it.

MR. HICKEY: Just a moment. Would you let the witness answer?

MR. GRATZ: I object to that question, who he would sell it to. I think Your Honor covered that.

THE COURT: The witness may answer if he can, Mr. Gratz.

THE WITNESS: We would sell them to wherever we could find a buyer.

By MR. HICKEY:

Q. In the ordinary course of your business, would you sell them to other merchants who would be in closer contact with the retail market, or would you customarily sell them directly to consumers?

A. Well, mostly to, I guess—you would call them retailers.

Q. Retail stores. May I suggest a few names? Cartier's, if he wanted them?

A. Cartier's.

(45) Q. Or Winston's?

A. Tiffany.

Q. Or Tiffany. You would be in the nature of a middleman between the stores and the sellers?

A. Yes.

MR. HICKEY: No further questions.

MR. GRATZ: That is all, sir.

THE COURT: Very well, you may stand aside, sir.

(Witness excused.)

MR. GRATZ: The petitioner rests, sir.

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(49) AARON LAUTERBACH, was called as a witness by and on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name.

THE WITNESS: Aaron Lauterbach.

MR. HICKEY: For the purpose of qualifying the witness, the witness has prepared lists of various persons for whom he has done appraisal work.

THE COURT: Let us get his business and his addresses into the record first.

EXAMINATION ON THE VOIR DIRE.

DIRECT EXAMINATION.

By MR. HICKEY:

Q. Where is your place of business?

A. 620 Fifth Avenue, New York City.

(50) Q. Where is your residence?

A. 2 East 86th Street, New York City.

Q. Do you do appraisal work?

A. Yes, specialize.

Q. Have you appraised large estates?

A. Very big.

Q. Have you appraised large stones?

A. Many.

Q. Have you appraised——

MR. GRATZ: I cannot hear the witness.

THE WITNESS: Many large stones, many.

By MR. HICKEY:

Q. Have you appraised stones over a size of 15 carats?

A. Yes, sir, many.

Q. Many of them?

A. Well. quite a few. I don't know, maybe 15 or 20.

Q. Have you appraised stones of over the size of 25 carats?

A. Yes, sir.

Q. Over the size of 30 carats?

A. Yes, sir.

Q. I have here a list that I will show you. Is that a list of estates that you have appraised?

A. Yes, sir, that is right.

Q. I notice that you have also listed stones. Are (51) those stones that you have appraised?

MR. GRATZ: May I examine that, sir? I have not seen it.

MR. HICKEY: Yes.

MR. GRATZ: I may object to it.

THE WITNESS: Yes, sir.

MR. GRATZ: With the Court's permission, may I look at it?

THE COURT: Yes, sir. You will supply counsel with it. May I see a copy of it?

By MR. HICKEY:

Q. So that reading down the list, taking some of these items at random——

MR. GRATZ: Before you use the list, may I be heard? I want to address an objection to the Court.

May it please the Court, I do object, not the witness using any memorandum to refresh his recollection on appraisals he may have made, but it seems to me, again, in line with Your Honor's ruling, the amount of the estate that he may have appraised or the size of it has no relevancy to this issue or the names of the parties for whom he made the appraisals or anything else.

It seems to me, for the purpose of showing his qualifications, he need only assert or tell Your Honor that he did make appraisals on these various dates of diamonds (52) that were of these sizes.

MR. HICKEY: Your Honor, I do not propose that the names should be prejudicial to the Court or the petitioner. I am offering this list to qualify the witness, to show that he has appraised large stones, and to identify the estates for which he did the work. This list was prepared by him from his own knowledge and from his books of record.

THE COURT: Well, you are not offering these amounts that appear on here as the amounts of the estates as of any probative value in this proceeding?

MR. HICKEY: No, Your Honor.

THE COURT: Or the name of the estate?

MR. HICKEY: The name of the estate or the amount.

THE COURT: You merely have those on there to show what estate these particular diamonds which he appraised was contained in?

MR. HICKEY: Yes, Your Honor.

THE COURT: For that purpose only, with the understanding that so far as this proceeding is concerned, the name of the estate and the size of the estate has no probative value so far as I am concerned.

MR. GRATZ: Yes, sir.

THE COURT: I take it that meets your objection?

MR. GRATZ: Yes, sir, because I had no objection to his using it, I just didn't want to have the record filled (53) with what I felt irrelevant matter. I don't know the names of these people.

MR. HICKEY: The respondent has agreed that the names of the estates are irrelevant and the total amounts of the estates are irrelevant.

THE COURT: They may be disregarded in this proceeding.

MR. GRATZ: The amount of the appraisal, certainly, for those stones—I cannot tell, sir. This sheet may be misleading. Your Honor may know it from some explanation which is given to you, but it says, for instance, in random, it says one emerald necklace or one square diamond, and opposite that it says "amount of appraisal," and it gives a large figure.

THE COURT: That is the appraisal of the entire estate. That is to be disregarded. There is no amount of appraisal on any of these stones in here. It just gives the size of the stone.

MR. HICKEY: And for the record I will state that that is absolutely correct.

MR. GRATZ: All right, sir. Otherwise, it would be very misleading.

THE COURT: I think the Court understood that, that these amounts do not apply to the stones in any way, shape, or form. If respondent seeks to prove the amount of the (54) appraisal, that will have to be done by the oral testimony of the witness.

THE WITNESS: I will try to do it.

THE COURT: The attorney will question you in regard to that.

By Mr. Hickey:

Q. Then in the center column of this list, are descriptions of certain large stones. Have you appraised those stones?

A. I have, yes, sir.

Q. Were you hired by private parties to do those?

A. Banks and lawyers.

Q. Banks or lawyers?

A. Banks in New York or their lawyers, and sometimes outside of New York, Rhode Island, Connecticut, New Jersey, as far as Florida.

The Court: And the date of those appraisals are set opposite each one there?

The Witness: Absolutely. And my name was mentioned in all affidavits.

Mr. Hickey: May I take that, please?

By Mr. Hickey:

Q. I hand you another list. I see here a list of banks. Did they hire you to assist them in appraising estates?

(55) A. Banks and the representatives of the people who were appraising the estates. My name is on all these affidavits.

Q. At the bottom of the list, I see another list of parties.

A. Yes, sir.

Q. Did those parties hire you?

A. Yes, sir.

Q. To assist them in appraising?

A. Yes, sir.

Q. Appraising jewelry?

A. Yes, sir.

Q. And large stones?

A. Yes, sir.

The Court: Mr. Hickey, let the Court get this straight. All these documents are merely being intro-

duced to qualify this witness as an expert in the appraisal of diamonds?

MR. HICKEY: Yes, sir. I thought it would be an expeditious way.

THE COURT: And not for the purpose of proving the value of any of these diamonds that are mentioned?

MR. HICKEY: No, Your Honor.

THE COURT: Did you have a list of these?

MR. GRATZ: Yes, sir, I did, sir.

(56) MR. HICKEY: I will offer in evidence for the purpose of establishing the qualification of the witness only a list of banks which Aaron Lauterbach has assisted in appraising jewelry, and a list of appraisal companies that Aaron Lauterbach has assisted in appraising jewelry.

THE COURT: That is Respondent's Exhibit No. C. Is there no objection to that list, Mr. Gratz?

MR. GRATZ: No.

THE COURT: There being no objection, Respondent's Exhibit C is received in evidence.

(Respondent's Exhibit C was received in evidence.)

MR. HICKEY: And as Respondent's Exhibit D, I offer in evidence for the purpose of establishing the qualifications of the witness a partial list of large estates appraised by Aaron Lauterbach in recent years.

MR. GRATZ: That is objected to.

THE COURT: I think you better offer a list of diamonds included in large estates which he has appraised.

MR. HICKEY: I will rephrase it in that manner.

MR. GRATZ: It is objected to, aside from that, sir, because that would seem to contravene your ruling. If

he wants to read into the record or have a list read by his witness into the record, the dates or the size of the diamonds that were appraised on that date or those dates, I will not (57) object. But all this other extraneous matter I do object to.

But you will have to advise him, Mr. Hickey, how the Court is limited, otherwise we will get into an argument.

THE COURT: I think you had better ask the witness the question if he appraised on these various dates the particular diamonds in a certain estate. I think you had better read that yourself, Mr. Hickey, and ask him the question on each individual one.

By MR. HICKEY:

Q. On the dates listed on this list, did you appraise the stones that are listed on this list?

A. Individual stones?

Q. Yes.

A. Yes, I did. Well, E. Eurana Schwab had a pear-shaped diamond.

THE COURT: You have answered that. Let Mr. Hickey read that into the evidence.

MR. HICKEY: A partial list of large estates appraised by Aaron Lauterbach in recent years. Date of the appraisal, June 2, 1939, one pear-shaped diamond, 60 carats, 60.03 carats; January 28, 1937, one diamond drop containing seven pear-shaped diamonds, 117 carats; June 18, 1940, one square diamond, 20 carats; April 22, 1941, one emerald necklace; August 3, 1944, one square diamond, 16 carats; November 9, 1944, three pear-shaped diamonds, 53 carats; one marquis (58) diamond, 9 carats; March 6, 1945, one diamond, 26 carats; April 13, 1945, one emerald, 25 carats, and also one emerald, 25 carats; November 17, 1946, one emerald necklace; June 4, 1948, one old line diamond, 24 carats;

June 18, 1948, one loose marquis diamond, 40.26 carats; June, 1950, one Oriental pearl necklace and also one Oriental pearl necklace with platinum marquis diamond snap.

THE COURT: On the dates that counsel has read, you did make appraisals of the jewels and stones that he read into evidence?

THE WITNESS: Absolutely.

DIRECT EXAMINATION.

By MR. HICKEY:

Q. Did you examine one marquis diamond weighing approximately 20 carats at the office of Mr. Gratz?

A. Yes, I examined that diamond on October 31 of this year at the office of Mr. Gratz.

Q. Did you also examine one emerald cut diamond weighing approximately 33.5 carats?

A. Yes, sir.

Q. At the office of Mr. Gratz?

A. On October 31, 1951.

Q. Now I want to state as correct that the fair market value is the price at which the willing buyer and the willing seller would trade, neither under any compulsion to buy, both (59) having a reasonable knowledge of all the facts. Now have you an opinion as to the fair market value in the retail market of the marquis diamond on October 2, 1946?

THE COURT: Have you an opinion as to it, yes or no?

THE WITNESS: Yes, sir. The marquis diamond regarding the retail value——

MR. GRATZ: Did you allow him to answer, sir?

THE COURT: Ask the question, Mr. Hickey.

By MR. HICKEY:

Q. Tell me your opinion of the fair market value in the retail market of the marquis diamond weighing about 20 carats on October 2, 1946.

MR. GRATZ: I don't know what my friend means by qualifying. Now he has qualified his question by speaking of the retail market and so forth. I thought he defined market value, and the witness stated yes, he could state an opinion. I have no objection to him stating that opinion. But now he broadens it.

THE COURT: Leave out the "retail."

THE WITNESS: My opinion is $90,000 plus 18 per cent, 20 per cent excise tax, total $108,000.

THE COURT: What do you mean by retail market value?

THE WITNESS: Eventually they have got to be sold retail, Judge.

THE COURT: Well, just explain that for the record.

(60) MR. GRATZ: May I be permitted to move to strike out his previous answer, consistent with my objection?

THE COURT: No, your objection will be overruled. I am going to try to get the facts.

What do you mean by retail market value?

THE WITNESS: When it goes to the retail private customer, when they buy it at a store.

THE COURT: You mean when it is sold to the consumer or the party who expects to wear the diamond, is that what you mean?

THE WITNESS: Yes, sir.

THE COURT: That is what that party would pay?

THE WITNESS: Absolutely.

THE COURT: Very well. You may inquire.

By MR. HICKEY:

Q. Now will you tell me why you appraised the diamond at that price?

A. Yes, sir. This diamond is an exceptionally fine diamond, and it is a rare gem regarding perfection, color, cutting, shape and brilliancy. In the course of my experience as an expert appraiser, being thoroughly familiar with market values, the retail value of this marquis diamond as of October 2, 1946, is $90,000 plus the Federal excise tax of $18,000.

Q. Did you prepare that statement yourself?

A. Absolutely. It is on my letterhead.

(61) MR. GRATZ: May I be permitted to see the statement from which the witness is reading?

MR. HICKEY: Yes, I offer you my copy.

MR. GRATZ: I want to see the one he has in his hand.

MR. HICKEY: It is the same thing.

MR. GRATZ: It doesn't matter. That is the one I am entitled to examine, not yours.

May I inquire, was this the paper from which you were reading?

THE WITNESS: Yes, sir, and that is my signature on it, too.

MR. GRATZ: All right, sir. Thank you.

THE COURT: Very well, let us proceed, gentlemen. There is no use to stop every question here and take four or five times as much time as necessary.

By MR. HICKEY:

Q. Have you an opinion as to the fair market value in the retail market of the emerald cut diamond on July 6, 1947?

A. Yes, sir.

Q. Just a minute. Tell me your opinion of the fair market value.

A. I will give you a description of it.

Q. How much did you value it at?

(62) A. Well, it was set in a diamond ring. One emerald cut diamond approximately 33.5 carats at $6,000 per carat is $201,000 plus 20 per cent Federal excise tax, total $241,200.

Q. Did you prepare that statement yourself?

A. Yes, sir.

Q. Can you tell me what reasons you had for appraising the stone at that value?

A. Yes, sir. This diamond is absolutely perfect and a perfect shape for a square diamond of 33.5 carats. The stone is an unusual diamond for its size, color, brilliancy and perfection. The retail prices as of July—whatever the date was—16—is specified as above.

Q. Are diamonds of the type you examined in Mr. Gratz's office very rare?

A. Absolutely. Absolutely.

Q. Are they difficult to duplicate?

A. You don't see many of them. You don't see many of them in years. They are beautiful.

Q. Would it require an intensive search to find other diamonds of this type?

A. You cannot find them. They don't exist.

Q. Would you call them unique?

A. Well, a red gem is very unique.

MR. GRATZ: He is leading the witness, sir, and I have not objected.

(63) THE COURT: Well, let us hurry along as rapidly as possible. You may answer. Go ahead and finish your answer, and we will move along.

By MR. HICKEY:

Q. How are market prices of large diamonds in 1946 and 1947?

A. Very strong. Very strong, especially gem stones are very rare.

Q. Was it higher than in 1941?

A. Yes, considerably higher.

Q. Do you know whether the retail market of large diamonds dropped between February, 1947, and July, 1947?

A. No, sir.

MR. HICKEY: No further questions. You may inquire.

CROSS-EXAMINATION.

By MR. GRATZ:

Q. Mr. Lauterbach, you have given some testimony about appraisals that have been made by you. Have you sold or dealt in or bought any diamonds of the size of 20.5 carats in the past ten years?

A. Well, I can answer that question. Indirectly, I was instrumental in selling the diamond, the pear-shaped diamond of E. Eurana Schwab. I sold it to Harry Winston for $142,500.

Q. I didn't ask you the amount. I asked you if you (64) made a sale.

A. I am an appraiser. I can direct a sale for a bank or lawyers, but when I am an appraiser, I don't put myself in a position to be a buyer. You can't ride two horses in one race.

THE COURT: In other words, you have not bought and sold diamonds of that kind?

THE WITNESS: What I have appraised has always been sold at an advantage.

MR. GRATZ: I move that that be stricken as not responsive.

THE COURT: Yes, it is not responsive.

THE WITNESS: Well, some of these big estates——

MR. GRATZ: Wait until there is a question before you, sir.

THE COURT: Just answer the question.

THE WITNESS: Yes, sir.

By MR. GRATZ:

Q. Without your giving me the reason for it, will you advise me or answer this question so the Court may know: Have you personally bought or sold any diamonds in the past ten years of the size of 33.5 carats? The answer is either yes or no.

A. No, I haven't bought or sold any diamonds in the last ten years. But I have appraised many.

(65) Q. Then your activity has been confined to appraisals, has it?

A. Absolutely.

Q. And these appraisals that you made concerning which you have testified were made in connection with inheritance or estate taxes, were they not?

A. Yes, sir.

Q. And were they made on behalf of these New York State inheritance tax departments or bureaus?

A. Also for the Federal Government.

Q. I will come to that in a moment. Did you make them then for the New York State inheritance tax department?

A. Yes, sir.

Q. And did you make some for the Federal Government?

A. Yes, sir. All of them. All go to the Federal Government because the estates are over $60,000.

Q. Now it may be that in an appraisal that you furnished it would be ultimately handed to the Government. But there is a difference in making one that goes to the Government and making one for the United States Government.

Did the United States Government employ you?

A. I have assisted the United States Government. I have never received any pay from the Government, and I am not on their payroll.

Q. Have you ever been commissioned or engaged by any (66) agency of the United States Government to make an appraisal? That is all I want to know.

MR. HICKEY: I think the discussion can be carried out without raising voices.

MR. GRATZ: I would suggest that the gentleman does not hear me.

MR. HICKEY: I would suggest that you stand near him.

MR. GRATZ: I am sorry. I will only raise my voice at your instance.

THE COURT: You may proceed. Let us proceed as orderly as possible.

By MR. GRATZ:

Q. My question is were you at any time in the past ten years—I will limit it that way—engaged by the United States Government or any department or agency thereof to serve as an appraiser for the Government?

A. I have answered that before. I told you I have assisted the United States Government. I never received any money from them, and I am not on their payroll. But I assist them on all big estates, yes, sir.

Q. Do you mean by assisting them that because you made an appraisal for one of these banks, like the National City Bank of New York, and it was an estate that involved $60,000, that your appraisal was then forwarded with the tax return to (67) the Government?

A. Excuse me. Let me make myself clear to you. I go over the other appraisers. Where they appraise jewelry, I assist the Government in going over their figures.

Q. In other words, where an appraiser was engaged by one of these banks, to determine the valuation of jewelry, you assisted those appraisers who worked for those banks and helped them in making up an appraisal that was fur-

nished either to the State or the Government on a tax return, is that what you mean?

A. Allow me to explain the procedure. When appraisers appraise an estate, the estate is filed with the Internal Revenue Department, whether it is Rhode Island, Connecticut, New Jersey, or New York State. Then I go over the figures of the appraisers.

THE COURT: Who employs you to do that?

THE WITNESS: I am not employed. I assist the Federal Government on all these big estates. I have been doing it for over twenty-five years.

THE COURT: Who obtains your assistance?

THE WITNESS: The agent in charge of the Fifth District, whether it is Rhode Island, Connecticut, New York or New Jersey. And I go over the figures.

THE COURT: He calls to you and gets your volunteer information, is that it?

(68) THE WITNESS: That is right, absolutely.

THE COURT: You volunteer an appraisal on these stones?

THE WITNESS: Yes, sir.

THE COURT: Is that limited to jewelry, or do they get your opinion on the entire estate?

THE WITNESS: That is the only thing I know, Judge, is the jewelry. I don't know anything about paintings, tapestries, or anything else.

THE COURT: You appraise only jewelry?

THE WITNESS: That is all.

THE COURT: And you do that without charge?

THE WITNESS: Absolutely.

THE COURT: At the request of the agent in charge of the investigation?

THE WITNESS: Yes, sir.

THE COURT: Very well.

THE WITNESS: But excuse me. One more, I will answer you one more. Why the appraiser that does this work, sir—he is out of the picture. He doesn't fit in at all when there is an examination. It is a private examination on the part of the Government. He is out. As soon as the papers are filed, he is out.

By MR. GRATZ:

Q. Do you see the stone or the diamond in each instance?

(69) A. I handle every one of them.

Q. And examine them?

A. Absolutely.

Q. And are those the instances, then, that you have given to the Court that you made examination of these diamonds on the dates previously given and read by Mr. Hickey?

A. Excuse me. Those are the estates that I appraised. But the appraised estates that I appraised for the Federal Government are unbelievable for size, for amounts, unbelievable. They run into millions.

Q. Let us come into estates that you appraised. That is what I am trying to get to.

A. There you are.

Q. Are these the estates that you appraised?

A. I said that before, that my name was on all the affidavits.

Q. Now, Mr. Lauterbach, these estates that you appraised, you were engaged then by whoever was interested in that estate, either as an executor or some other fiduciary or a beneficiary to the estate, is that not right?

A. The names are on the bottom there. The names of the people who employed me to do the work.

Q. I do not want to use names. I say they employed you?

A. Yes.

(70) Q. And is it not true that they employed you, and your compensation was fixed on a percentage basis?

A. On all those, yes, sir.

Q. All right. How was your compensation fixed?

A. One per cent.

Q. One per cent of the—one per cent of what?

A. One per cent of the appraisal. One per cent of the total appraisal.

Q. So that whatever the amount of that appraisal was, the higher that it was the greater your compensation?

A. I don't take that into consideration at all.

Q. I didn't say that you did. That is not my inference.

THE COURT: That is natural, the higher the appraisal the more you would get on that one per cent basis.

THE WITNESS: That is out of the picture because if I would do that the estate would have no confidence in me. I am not looking out to get more money.

By MR. GRATZ:

Q. Mr. Lauterbach, I am not impugning your integrity or honesty. I merely want to know if it is not true that your compensation in these instances was geared to the amount of your appraisal.

A. I can answer you that in another way. In other words, some of these estates have been sold at public auction, (71) at Parke-Bernet, New York City.

MR. GRATZ: That is objected to as obviously not responsive.

THE WITNESS: And I never lost on one estate. They have always brought 5 or 7 per cent more than my appraisal.

MR. GRATZ: I move that that be stricken out.

THE COURT: That will be stricken out. It is not responsive to the question. The question was the amount of your fee being governed by the size of the appraisal, if you were on a one per cent stage basis, is that not true?

THE WITNESS: Yes.

THE COURT: In other words, if you appraised a diamond at $50,000, you had a larger fee than for one that was appraised at $25,000.

THE WITNESS: Well, there are two classes there. A $50,000 diamond is not in the same class as a $25.

THE COURT: I know that, but your fee was larger on the appraisal of a $50,000 diamond than it was on the appraisal of a $25,000 diamond.

THE WITNESS: It is on the merit of the diamond, that is all I can say.

MR. HICKEY: I will concede the answer to the question.

By MR. GRATZ:

Q. Now, Mr. Lauterbach, did you enter into such an (72) arrangement in this case, to appraise the diamond on a percentage of the valuation?

A. There has been nothing said regarding any fee coming to me.

Q. Then you have not made any arrangements?

A. I have made no arrangements whatsoever.

MR. HICKEY: I think, for the record, that it should be stated that some conversations have taken place—excuse me for interrupting your questioning. Mr. Lauterbach, I direct your attention to our discussion in the hotel room last night.

MR. GRATZ: This is very objectionable, sir. If Mr. Hickey wants to testify or give testimony on that, he

can. But I don't think he can while the witness is under examination.

THE COURT: You may inquire.

By MR. GRATZ:

Q. Your answer is that you have made no arrangement with respect to your compensation?

A. No, I have made no arrangement.

Q. And have not discussed it either, have you?

A. I spoke about it, but I haven't made any arrangements with them.

Q. Did you tell them that you were customarily engaged on a one per cent of the appraisal value basis?

(73) A. When I signed an affidavit——

Q. No, no. Did you tell the representatives of the Government when you started talking about your compensation that you were customarily engaged on a per cent of the appraisal value?

A. There was no mention of any percentage whatsoever.

Q. Now in valuing the diamond, the diamond of 20.5 carats, you valued it at $4,500 a carat, did you not, according to the paper that you have?

A. The retail value is $4,500 a carat.

Q. I didn't ask you about a retail value. I asked you about your fair market value.

A. You can put any price on it because there is not a duplicate of that diamond in New York City. It is so fine.

Q. You say you could put any price on it, Mr. Lauterbach?

A. Yes, sir, any price on that.

Q. Would you be justified, then, in saying to this Court that instead of taking $90,000 you could have valued it at $180,000?

A. In case of loss, it could never be duplicated, it is so fine.

Q. Is it your answer that instead of valuing that stone at $90,000, $4,500 a carat, you could have just as well given the value of $180,000 at $9,000 a carat?

(74) A. I am sticking here to my figures here of $4,500 a carat.

Q. But you said a moment ago that you can put any valuation on it.

A. You can, within reason, because there is not a duplicate gem like that in the whole argument.

THE COURT: That is argument. Proceed.

By MR. GRATZ:

Q. Is it not true that you know no stone of 20.5 carats that was sold in 1946 by anyone for as much as $4,500 a carat?

A. Well, retail I don't know what goes on in the retail market.

Q. Well, you do not know what goes on in the retail market——

A. Nobody else does.

Q. And yet you have presumed to tell this Court what the retail value would be.

A. Retail, they don't exist. They don't exist.

Q. And your answer is that they do not exist?

A. I don't know the origin of this stone.

MR. GRATZ: I have no further questions of this witness in view of his answers.

If it please the Court, I am not going to make any examination unduly long.

(75) THE COURT: You may inquire, Mr. Hickey.

RE-DIRECT EXAMINATION.

By MR. HICKEY:

Q. Mr. Lauterbach, did you arrive at those values after thought and consideration?

MR. GRATZ: Objected to as not re-direct examination, and also as leading.

THE COURT: The objection will be overruled.

THE WITNESS: I appraised those diamonds, and I arrived at a figure.

By MR. HICKEY:

Q. Did you arrive at a fair figure?

A. Absolutely.

MR. GRATZ: That is objectionable. It characterizes his testimony, if it please the Court.

By MR. HICKEY:

Q. Did you try to determine the fair market value in the retail market of those two diamonds?

A. Yes, sir, as of that date.

MR. GRATZ: Will Your Honor note an objection and exception, sir, if you overrule me, on these last questions, particularly on the last question.

THE COURT: Your exception is noted, and your objection is overruled.

THE WITNESS: October 2, 1946.

(76) MR. HICKEY: No further questions, sir. One moment, please, I do have one further question.

By MR. HICKEY:

Q. Mr. Lauterbach, besides appraising stones, have you advised purchasers, buyers, and sellers of diamonds about the prices they should pay or sell at?

A. I am not in that business. That is not my business.

Q. You have just done appraisal work?

A. That is all.

Q. Now that list of jewelry that you appraised, were you hired by private persons to do that work?

A. Absolutely.

Q. You were not hired by the Government to do that?

A. No, sir.

Q. You have assisted the Government in other estates?

A. Yes, sir.

MR. HICKEY: No further questions.

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(77) EDWARD SUMNICK, was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Edward Sumnick.

THE CLERK: State your residence.

THE WITNESS: Residence is 37th Place. The place of business is 20 West 47th Street.

DIRECT EXAMINATION.

By MR. GRATZ:

Q. I believe, Mr. Sumnick, you have given your place of business as 20 West 47th Street, New York?

A. That is correct.

Q. With what concern are you associated?

A. William S. Hedges and Company.

Q. And what is their business?

A. They import and deal in loose diamonds, exclusively.

Q. Diamonds?

A. That is all.

Q. And when you use the word "loose"——

A. It means unmounted.

Q. And how long have you personally, without regard to (78) Hedges and Company, how long have you personally engaged in the dealing or buying and selling of diamonds?

MR. HICKEY: I object, Your Honor, on this ground: That the petitioner has had an opportunity to call Mr. Sumnick when he was putting on his case, and for him

to wait now until respondent has rested to call a witness is prejudicial.

MR. GRATZ: I will state an offer of proof, if my friend wants it. It is not to go through any lengthy examination.

THE COURT: Objection overruled.

By MR. GRATZ:

Q. The Court has permitted you to answer. Will you answer the question? It is about the length of time that you personally have been so engaged.

A. Personally I would say about twenty-five years.

Q. And how long has Hedges and Company been in the business of selling and dealing and buying diamonds?

A. Seventy years.

Q. And how long, Mr. Sumnick, have you been associated with Hodges and Company?

A. Three years.

Q. You are here, are you not, in response to a subpoena served upon you in New York City at the instance of the petitioner taxpayer in this case?

(79) A. I am.

Q. It is true, is it not, Mr. Sumnick, that you were engaged or called by the Government, the Bureau of Internal Revenue, to make an examination of the items of property in this case?

A. I was.

Q. Is it not true, Mr. Sumnick, that you did make such an examination on September 17 of this year, 1951, in the Bureau of Internal Revenue in the offices of the technical staff?

A. I examined them. I can't testify as to the exact date. I wouldn't remember.

Q. Well, was it on or about September of 1951?

A. I would say a couple of months ago.

Q. And is it not true that at that time you examined, on behalf of the Government, two diamonds, one 20.5 carats and the other 33.5 carats?

A. I did.

Q. Who was present at the time you made that examination?

A. You were, and this Mr. Hickey, and this gentleman over here.

MR. GRATZ: The gentleman being identified as Mr. Boushee.

THE WITNESS: That is right.

(80) By MR. GRATZ:

Q. After that examination was concluded, who remained?

A. What do you mean, in the office?

Q. Yes. Well, I left, did I not? And I participated in no discussion between yourself and the representatives of the Government?

A. No.

Q. Without saying what that conversation was, and I don't want to have you do that, did you have some conversation or have some conversation with Mr. Hickey and Mr. Boushee as representatives of the Government as to your opinion of the fair market value of that jewelry?

A. I offered to give them a certain amount of money for them.

Q. Aside from what you offered them, did you give them your opinion of value?

A. I did.

Q. And had you been brought over from New York for that purpose, and were you so advised?

MR. HICKEY: I object on the ground that that is irrelevant.

THE COURT: Overruled.

By Mr. Gratz:

Q. Having stated such an opinion to the Government, did they see fit to call you in this case? Were you called?

(81) A. No.

Q. Will you tell His Honor whether you, having dealt and bought in diamonds, are able to state an opinion as to the fair market value of the diamond which has been described in the stipulation of facts as a marquis diamond weighing 20.5 carats as of October 2, 1946, and the diamond that has been identified as the emerald cut diamond weighing 33.5 carats, approximately 33.5 carats—33.45 carats—as of July 16, 1947, bearing in mind that by fair market value is meant the price at which such property would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell and each having a reasonable knowledge of the facts of the situation?

Are you able—will you please answer in the affirmative or negative—to give such an opinion?

A. Can I qualify that question? I can't answer that thing yes or no.

The Court: You cannot?

The Witness: No. Supposing I give you a qualified answer. I stated at that time what I would give for those stones as of this date. The question was asked of me what they were worth in 1947. I said, "About the same."

Now don't ask me to say what I would have given in 1947. I might not have felt right.

By Mr. Gratz:

(82) Q. Aside from how you might have physically felt in 1947——

The Court: His question was did you have an opinion as to what they were worth then.

By Mr. Gratz:

Q. Are you able to form an opinion of the value either in 1946 or 1947, based upon your knowledge of the market?

A. I was.

Q. And then without regard as to your personal feelings on the matter, will you state to His Honor what the fair market value was on October 2, 1946, of the diamond that you examined weighing 20.5 carats?

A. Well, based on recollection, Your Honor, I said what the diamond was worth as of the date I examined it, and I said that I would figure in 1947, without regard to October 2nd or 3rd or 4th or 5th——

The Court: 1946?

The Witness: 1946—that the value would be about the same.

By Mr. Gratz:

Q. What was that value?

A. The value I put on the 33-carat emerald?

Q. No, on the 20.5.

A. On the 20.5, I offered $2,500 a carat.

Q. $2,500 a carat was the amount that you gave as the (83) value?

A. That is right.

Q. And if we were to multiply that out, that would be slightly over $50,000, would it not?

A. Yes.

Q. Well, for 20 carats it would be $50,000, and for half a carat it would be $51,250.

The Court: The Court wants a little information here. Is that what you would value it to purchase for your business, or is that what you would expect to sell it to a prospective purchaser for?

The Witness: That is what I would buy it for the business for. What I would sell it for——

THE COURT: If you were going to sell it for that, you would have to add a profit to that prospective purchaser?

THE WITNESS: That is the general idea.

THE COURT: And you would also have to add whatever the general excise tax was?

THE WITNESS: That is correct.

By MR. GRATZ:

Q. Now, then, following His Honor's question about the fact that you would sell it at some profit to a prospective customer, and would also, in such an event, add the excise tax, I assume you are talking now of a sale to a consumer?

A. That is right, to whoever will buy.

(84) Q. So if you sold it, it would be a sale at retail?

A. It might be; it might not be.

Q. Under His Honor's illustration, you cannot have excise to another dealer.

A. It would be a sale at retail.

Q. All right. What percentage would you obtain on it on such a sale, what percentage above the $51,250?

A. All the guy would be able to pay.

Q. I understand, but that might be what you would try to get. What was your experience as to the price that you would get? Is it 10 per cent in accordance with what Mr. Sommer said?

A. I would gladly sell it for 10 per cent.

Q. You what? You would be glad to sell it for 10 per cent?

A. Glad to sell it for 10 per cent.

Q. Would you sell it for less than 10 per cent?

A. If I turned it over the next day, I would turn it for less, certainly. How could I make a couple of thousand dollars any quicker?

Q. Now, then, is it your statement to the Court—I am following His Honor's question—that if you took the value

in 1946 at $51,250 that you would pay it, included in this value or added to it would be a 10 per cent profit to you, to the retailer, plus the excise tax of 20 per cent?

(85) A. Boy, that would be beautiful.

Q. That would be good?

A. That would be darned good.

Q. And would that be the true fair market value sold retail to a customer in 1946 for that 20-carat, 20.5-carat diamond?

A. Why not? I would sell it to anybody.

Q. Now then, with respect to using your same formula, with respect to the 33.45 diamond, in the next year, in 1947, approximately July 17—but you need not confine yourself exactly to that date, but on about that date—what was the fair market value, using your formula per carat of that stone?

A. $3,500.

Q. And at $3,500——

A. It makes $117,000, roughly.

Q. That would be what?

A. Roughly $117,000.

THE COURT: And if you were selling it to a prospective purchaser, you would then have your profit and the excise tax to add?

THE WITNESS: Add to that.

By MR. GRATZ:

Q. May I inquire whether your maximum profit to which you refer would be 10 per cent?

A. You can't say maximum. I will get all the law

(86) allows.

Q. I understand that, but will you tell us what was obtainable in the market in 1947? Would it be 10 per cent of such a price?

A. 10 per cent would be beautiful.

Q. When you say "beautiful," do you mean by that it would be too high?

A. No, it would be a wonderful profit. You don't turn over $117,000 every day.

Q. Now if we add 10 per cent, then you add $11,700?

A. That is correct.

Q. And then add 20 per cent for excise tax?

A. That is right.

Q. And is the net or total result of that your statement of the fair market value at retail to a retail customer in July, 1947, of that diamond, of the 33.5-carat diamond, in your opinion?

A. It is.

Q. All right. Now, you did examine the earrings, did you not?

A. I examined those this morning.

Q. And they were exhibited to you?

A. That is right.

Q. Will you tell us the fair market value of those earrings as of July 16, 1947, in your opinion?

(87) A. I didn't care for them, so I put a value of $5,000 on them.

Q. Is it your belief that $5,000 was the fair market value in 1947? Whether you like them or not is of little moment.

A. I am the one who pays for them. Sommer bought them for $6,000.

Q. And I think Mr. Milner gave a figure of somewhere near yours of $5,000.

A. I think he said $5,500.

Q. At any rate, you did not like them so much, so you said five.

A. Five.

Q. Now following His Honor's questions, do we add to that a profit for you?

A. Naturally.

Q. Up to what amount, at 10 per cent?

A. I will take 10 per cent any day.

Q. Then the Federal excise tax, is that correct?

A. That is correct.

Q. And would the total of that, with the total of that, which would be $5,500 plus 10 per cent, plus 20 per cent excise tax—would that be the fair market value of those earrings as of July 16, 1957, in the retail market sold to a customer or a consumer going to wear them?

A. By me, yes.

(88) MR. GRATZ: All right. Cross-examine.

CROSS-EXAMINATION.

By MR. HICKEY:

Q. Mr. Sumnick, conversations we have had have been illustrated here. Did you tell me, in the course of that conversation, as your final conclusion, that the only price you could give me would be the price you would pay for the diamond?

A. That is correct.

Q. That necessarily would not be what the market would value the diamond at, it is just personally what you placed on it?

A. That is right. Somebody else might bid more, somebody else might bid less.

Q. And did you then suggest that we go and see a retailer?

A. I did.

Q. And you accompanied me to see a retailer, to get his opinion as to how prices would run?

A. Tried to get two.

Q. We did try to get two, that is correct. Now your business is the wholesale end of the diamond business?

A. That is correct.

Q. And how long have you been in that business?

A. Next year it will be forty years.

(89) Q. In the wholesale business?

A. That is right.

Q. And you know of the retail market only by indirect means? You sell into the market, is that correct?

A. I don't cater to the retail trade, if that is what you mean.

Q. Whom do you sell to?

A. The stores.

Q. The stores?

A. That is right.

Q. Would you answer this question: In your opinion, do you think that the fair retail value might be considerably above the values you have used in your discussion with Mr. Gratz?

A. I would even try to get more.

Q. In other words, is my understanding correct when I say that your conversation as to fair market value has been limited to what you personally would pay for this stone and the amount you would sell the stone for?

A. That is right.

Q. You have not taken into consideration what a willing buyer would pay to a willing seller?

MR. GRATZ: He has not said that, sir.

THE WITNESS: I am a willing buyer, and the others, I assume, are a willing seller.

(90) By MR. HICKEY:

Q. You are putting yourself in the position of one of the parties to the transaction?

A. That is right.

Q. And you are deciding then what you would do in the light of all your experience in business?

A. That is right. That is what makes me a living.

Q. Would you sell to retail stores such as Harry Winston?

A. Yes, I would love to.

Q. And from your knowledge of the trade, can you say whether or not he would charge considerably more for the diamond than the price you sold it for?

MR. GRATZ: That is objected to, sir, as immaterial and irrelevant, what another dealer might charge for it.

THE COURT: Well, in his business as a wholesaler, if he has a general idea of what the mark-up of retail jewelry stores is, I would be glad to hear it—if you have any knowledge as to how much profit they generally charge.

THE WITNESS: Judge, can I answer you directly on that?

THE COURT: Yes.

THE WITNESS: It all depends on how bad the man wants to buy, how badly he wants to unload the stone he has, as to how much you can get for it. Now you will find some (91) retailers will be glad to take 10 per cent, some want 20, some want 25, some even want 50. The ones who want 50, don't often make the sale because, after all, things are competitive.

There are only two who handle these big stones. One is Harry Winston, and the other is Van Cleef and Arpels. If I bought it, I would probably try to sell to Harry Winston.

THE COURT: And you do not know what margin of profit these dealers charge?

THE WITNESS: On big diamonds like that, I think that is an exception.

THE COURT: You do not think they have any regular mark-up?

THE WITNESS: No, they don't have any.

THE COURT: Very well.

MR. HICKEY: No further questions.

MR. GRATZ: That is all.

MR. HICKEY: The respondent rests.

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MEMORANDUM FINDINGS OF FACT AND OPINION.

This proceeding involves gift tax deficiencies for 1946 and 1947 in the respective amounts of $13,875 and $43,162.50. The only question in issue is the value at the date of the gifts of several pieces of diamond jewelry which petitioner gave to her daughter in 1946 and 1947.

FINDINGS OF FACT.

Petitioner is a resident of Philadelphia, Pennsylvania. She filed gift tax returns for 1946 and 1947 with the collector for the first district of Pennsylvania. In her 1946 return she reported, among others, a gift to her daughter, Helen P. Neuman, of a diamond ring valued at $50,000. Respondent determined that the ring had a value at the date of the gift of $100,000.

In her 1947 return petitioner reported gifts to the same donee of another diamond ring valued at $115,000 and a pair of diamond ear clips valued at $6,000. Respondent determined that the gifts had a value of $240,000.

The subject matter of the 1946 gift was a marquise-cut diamond of 20.5 carats in an iridium platinum setting with two tapered, bullet shaped diamonds. The donor purchased the ring April 9, 1941, from Joseph Milner of the firm of The House of Milner, wholesale and retail diamond merchants of Philadelphia, for $45,000. She paid a ten per cent Federal excise tax on the purchase. She reported the gift in her 1946 gift tax return at a value of $50,000. Respondent determined in his deficiency notice that the ring had a value at the date of the gift of $100,000.

The fair market value of the 1946 gift was $58,500.

The 1947 gifts were an emerald-cut diamond weighing 33.5 carats in a ring mounting and a pair of marquise-cut diamond ear clips of .56 carat. The ring and ear clips were purchased by the donor from Harry Winston, Inc., New York, New York, February 5, 1947, for $200,000, plus 20 per

cent, $40,000, Federal excise tax. Respondent valued the gifts in his deficiency notice at $240,000.

The value of the 1947 gifts were not less than $240,000.

OPINION.

LEMIRE, *Judge:* Aside from their wide difference of views on the actual sale value of the diamonds, based on the testimony of their expert witnesses, the parties are in further disagreement as to whether the values now in question are the wholesale or the retail values of the diamonds and whether the excise tax paid on the purchases by the donor is or is not to be taken into consideration in determining value.

The gift tax under section 1005, Internal Revenue Code, is levied on the value of the property at the date of the gift. This value has been accepted generally as meaning the fair market value, which, as stated in respondent's Regulations 108, section 86.19, is "the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell." Whether this value is to be determined in relation to the wholesale or to the retail market depends upon the nature of the commodity and the trade practices under which it is customarily bought and sold. There was testimony by petitioner's expert witnesses that no actual retail market exists for "gem" diamonds of the weight and quality of those under consideration, and that there is a very limited trade in such diamonds. It was not shown, however, that there is any more of an established wholesale market than there is a retail market. Every dealer making a purchase of such a diamond would, of course, expect to sell it at a profit. That sale might be either to another merchant or to a consumer. The testimony of the expert witnesses was to the effect that this profit amounts to from about 10 per cent to whatever the customer can be induced to pay.

It is not unlikely that any satisfactory sale of the diamonds under consideration by either the donor or the donee at about the time of the gifts would have had to be negotiated through an established dealer or commissioned merchant who would have charged the seller a fee or commission for his services.

We held in *Estate of Frank Miller Gould,* 14 T.C. 414, that the value of a diamond ring for gift tax purposes was the price the donor paid for it to a retail jeweler a few days before the gift, inclusive of the excise tax which the purchaser paid. The controversy there centered, apparently, upon whether the excise tax should be included in determining value; for it is stated in the opinion that the facts were stipulated, and that "The only evidence of value submitted in the record is the circumstances of the arm's length sale and purchase which took place about one week prior to the date of the gift."

As a basis for a possible distinction of the instant case from the *Gould* case, *supra,* we do have here considerable other evidence than the mere circumstances of the sales. We have the testimony of four expert witnesses, three for the petitioner and one for the respondent, all of whom we deem well qualified. One of petitioner's witnesses placed a value of $46,650 on the 1946 gift and a value of $114,500 on the 1947 gifts. A second witness for petitioner valued the 1946 gift at about the same amount and the 1947 gifts at $78,590. Petitioner's third witness placed values of $51,250 on the 1946 gift and $122,000 on the 1947 gifts. These values were all said to be wholesale values, the amounts which a dealer would have been willing to pay, and were exclusive of any Federal excise tax. Respondent's witness placed a value of $90,000 on the 1946 gift and a value of $201,000 on the 1947 gifts, exclusive of Federal excise taxes. Petitioner's witnesses are all well-established diamond merchants. Respondent's witness is not a dealer but he has had considerable experience as an appraiser of diamonds such as those under consideration. We have found it impossible

to reconcile the testimony of the various expert witnesses. Even with allowance for the difference between the so-called wholesale and retail prices and the Federal excise taxes, there is still a wide difference between their conclusions. Nor do we think that their testimony, taken as a whole, affords a better measure of the value of the gifts than the prices which the donor actually paid for the property in the open market, with the adjustments indicated. Petitioner does not claim that she was defrauded in the purchase of the diamonds from Harry Winston, Inc., in 1947, and in this proceeding there is no evidence of fraud or deceit in connection with the transaction.

Following our decision in *Estate of Frank Miller Gould, supra,* and bearing in mind that the 1947 gifts were made approximately five months after the donor had purchased the diamonds for $240,000, including the excise taxes, we hold, and have found above, that the value of these gifts on the date thereof was not less than $240,000, the value determined by the respondent in his deficiency notice. The evidence does not show that there was any material change in the value of diamonds over the five months' period between the date of purchase by the donor and the date of the gifts.

As to the 1946 gift the situation is somewhat different. The donor purchased the ring in 1941 for $45,000, plus excise taxes of $4,500. One of petitioner's witnesses testified that there was an increase in the value of large diamonds in the neighborhood of 20 per cent between 1941 and 1946 when the gift was made. This would give the ring a value at the date of the gift based on cost to the donor (*Estate of Frank Miller Gould, supra*) of $58,500; that is, cost, $45,000, plus 20 per cent appreciation in value, $9,000, plus the $4,500 excise tax. We, therefore, hold, as found above, that the value of the 1946 gift was $58,500.

Decision will be entered under Rule 50.

Entered May 26, 1952.

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION.

The attached proposed computation is submitted, on behalf of the respondent, to The Tax Court of the United States, in compliance with its memorandum opinion entered May 26, 1952, determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the right of either party to contest the correctness of the decision entered herein by the Court, pursuant to the statute in such cases made and provided.

CHARLES W. DAVIS,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

HARTFORD ALLEN,
District Counsel.
CHARLES J. HICKEY,
Attorney, Bureau of Internal Revenue.

NO OBJECTION:

/s/ EARL JAY GRATZ,
Counsel for Petitioner.

COMPUTATION STATEMENT

In re: Rose Publicker
Philadelphia, Pennsylvania
Docket No. 28356

Gift Tax

Year	Deficiency
1946	$ 2,733.75
1947	41,272.50

The details supporting the computation for 1946 and 1947 are shown in the attached pages 2 and 3.

Schedule 1

The memorandum findings of fact and opinion of The Tax Court of the United States entered May 26, 1952, and the deficiency notice dated February 23, 1950, have been made the basis of the adjustments shown in the following schedules.

Year 1946

Schedule 2

ADJUSTMENT TO NET GIFTS

Net gifts, deficiency notice dated February 23, 1950	$622,000.00
Less: Decrease in value of 1946 gift	41,500.00
Net gifts as adjusted	$580,500.00

Schedule 3

EXPLANATION OF ADJUSTMENT

Fair market value of marquise diamond as reflected in the deficiency notice	$100,000.00
As adjusted	58,500.00
Reduction in value	$ 41,500.00

Year 1946

Schedule 4

COMPUTATION OF TAX

Net gifts for the year 1946	$580,500.00
Total net gifts for preceding years	330,666.10
Total net gifts	$911,166.10
Tax on total net gifts	$219,623.59
Less: Tax on gifts of preceding years	68,634.86
Tax on net gifts for 1946	$150,988.73
Gift tax liability for 1946 as adjusted	$150,988.73
Gift tax assessed: March 1947, p. 211, line 1	148,254.98
Deficiency in gift tax for 1946	$ 2,733.75

Year 1947

Schedule 5

COMPUTATION OF TAX

Net gifts for the year 1947 (unchanged)	$ 752,620.00
Total net gifts for preceding years	911,166.10
Total net gifts	$1,663,786.10
Tax on total net gifts	$ 451,427.81
Less: Tax on gifts of preceding years	219,623.59
Tax on net gifts for 1947	$ 231,804.22
Gift tax liability for 1947 as adjusted	$ 231,804.22
Gift tax assessed: March 1948, p. 208, line 1	190,531.72
Deficiency in gift tax for 1947	$ 41,272.50

DECISION.

Pursuant to the Court's Memorandum Findings of Fact and Opinion, entered May 26, 1952, the respondent filed a computation which is agreed to by the petitioner. Therefore, it is

DECIDED that there are deficiencies of $2,733.75 and $41,272.50 in gift tax for 1946 and 1947, respectively.

(Signed) C. P. LEMIRE,
Judge.

Entered: AUG. 21, 1952.

PETITION FOR REVIEW.

Taxpayer, Rose Publicker, the petitioner in this case, by her attorney, Earl Jay Gratz, hereby files her petition for a review, by the United States Court of Appeals for the Third Circuit, of the decision by the Tax Court of the United States in the above captioned proceedings and respectively represents:

1. The controversy involves the respective values of gifts of diamond jewelry made by petitioner in 1946 and 1947.

2. The decision sought to be reviewed was entered by the Tax Court, under Rule 50, on August 21, 1952, pursuant to an opinion filed May 26, 1952.

3. The controversy involves deficiencies found by the Tax Court in the petitioner's Federal Gift Taxes for the calendar years 1946 and 1947 in the respective amounts of $2,733.75 and $41,272.50.

4. The petitioner filed Gift Tax returns for 1946 and 1947 with the Collector for the First District of Pennsylvania at Philadelphia.

/s/ Earl Jay Gratz,
Earl Jay Gratz,
1421 Chestnut Street,
Philadelphia, 2, Pa.,
Attorney for Petitioner.

[fol. 90] [Stamp:] Received and filed December 4, 1952, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Tax Court Docket No. 28,356

ROSE PUBLICKER, Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent on Review

PETITION FOR DOCKETING PETITION FOR REVIEW AND FILING THE RECORD OUT OF TIME

To the Honorable, the Judges of the said Court:

Earl Jay Gratz, attorney for Petitioner on Review, hereby requests the Court to docket the Petition for Review and to file the record out of time, for the following reasons:

1. Petition for Review was duly filed in the Tax Court of the United States on October 9, 1952.

2. By letter dated October 30, 1952 the Clerk of your Honorable Court requested payment of Clerk's fees within the time prescribed by the applicable Rules, but through an inadvertence the Clerk's letter was misfiled and not discovered until November 28, 1952.

Wherefore, it is respectfully requested that an Order be entered allowing the docketing of the Petition for Review and the filing of the record out of time.

(S.) Earl Jay Gratz, Attorney for Petitioner on Review.

Dec. 4, 1952. So ordered.

Present: Biggs, Maris and Hastie, JJ.

By the Court: Biggs, Ch. J.

[fol. 91] United States of America,

Commonwealth of Pennsylvania,
County of Philadelphia, ss.:

Earl Jay Gratz, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Petition are true and correct.

(S.) Earl Jay Gratz.

Sworn to and subscribed before me this 28th day of November, 1952.

(S.) Louise S. Rubinsohn, Notary Public.

My Commission Expires February 1, 1953.

[fol. 92] [Endorsed:] U. S. Court of Appeals for the Third Circuit. Tax Court Docket No. 28,356. Rose Publicker, Petitioner on Review vs. Commissioner of Internal Revenue, Respondent on Review. Petition for Docketing, Petition for Review and Filing of the Record Out of Time. Law Offices, Earl Jay Gratz, Morris Building, 1421 Chestnut Street, Philadelphia 2.

[fol. 93] [Stamp:] Received and filed, January 28, 1953, Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Civil Action No. 10,951

ROSE PUBLICKER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

STIPULATION

It is hereby stipulated by and between counsel for the parties to the above entitled proceeding, subject to the approval of the Court, that the time for filing the brief in

behalf of the Commissioner of Internal Revenue may be extended to February 9, 1953.

This extension of time is not intended to interfere with the argument of the case in its regular order.

Earl Jay Gratz, Counsel for the Petitioner; Charles S. Lyon, Assistant Attorney General, Counsel for Commissioner of Internal Revenue.

Approved: William H. Hastie, Circuit Judge.
January 28, 1953.
January 26, 1953.

[fol. 94] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,951

ROSE PUBLICKER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review the Decision of the Tax Court of the United States

Argued March 20, 1953

Before Biggs, Chief Judge, and Maris and Goodrich, Circuit Judges

OPINION OF THE COURT—Filed July 16, 1953

By BIGGS, Chief Judge:

The issue before us is the value for gift tax purposes of jewelry given by the petitioner, Mrs. Rose Publicker, to her daughter in 1946 and 1947.

26 U. S. C. A. § 1000(a) states: "For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. . . ." Section 1005 provides: "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the

gift." Treasury Regulations 108 further explains the mean-
[fol. 95] ing of "value" as used in the statute: "Sec. 86.19. *Valuation of Property.* (a) *General.* The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered."

The following facts are not in dispute. On April 9, 1941, Mrs. Publicker purchased from Milner, of a Philadelphia wholesale and retail diamond firm, a diamond ring containing a marquise-cut diamond of 20.5 carats in an iridium platinum setting with two tapered, bullet-shaped diamonds. For this ring Mrs. Publicker paid $45,000 plus a ten per cent Federal excise tax of $4,500. On October 2, 1946, Mrs. Publicker gave the ring to her daughter, and in her gift tax return for that year she reported its value on the date of gift as $50,000.

On February 5, 1947, Mrs. Publicker purchased from Harry Winston, Inc., in New York a second diamond ring containing an emerald-cut diamond weighing 33.45 carats in a ring mounting. On the same day she bought from the same seller a pair of marquise-cut diamond ear clips of .56 carat. Mrs. Publicker paid $200,000 for the ring and the ear clips, plus a twenty per cent Federal excise tax[1] of $40,000. She gave these pieces of jewelry to her daughter

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[1] This tax was increased from ten to twenty per cent in 1944 as a temporary war measure. 58 Stat. 61. But by the Act of March 11, 1947, 61 Stat. 12, the termination date of this increase was removed. The present provision is contained in 26 U. S. C. A. § 1650.

on July 16, 1947, valuing them in her 1947 gift tax return [fol. 96] at $115,000 for the ring and $6,000 for the ear clips.

Upon examination of Mrs. Publicker's gift tax returns the Commissioner sent to her his notices of deficiency in which he valued the 1946 gift at $100,000 and the 1947 gifts at $240,000. The deficiencies claimed were $13,875 and $43,162.50 respectively.[2]

Mrs. Publicker contested the claimed deficiencies in proceedings brought by her before the Tax Court. Upon trial the Tax Court redetermined the deficiencies for 1946 and 1947 in the respective amounts of $2,733.75 and $41,272.50, finding the value of the 1946 gift to be $58,500 and the value of the 1947 gifts to be not less than $240,000. The memorandum findings of fact and opinion of the Tax Court are not reported officially but see CCH Dec. 18,993 (M) at 11 TCM 519. Mrs. Publicker petitions for review.

The criteria to be employed in determining "value" necessarily must differ somewhat in respect to the kinds of property to be valued under the statute. A question of law is presented therefore as to the standard to be applied. See Powers v. United States, 312 U. S. 259, 260 (1941). But the Tax Court's determination of value, the proper standard having been applied by it, is a finding of fact. This finding, based upon the resolution of conflicting evidence, may not be disturbed unless clearly erroneous. See 26 U. S. C. A. Section 1141 (a) and FRCP, Rule (52) (a).

At the trial before the Tax Court the petitioner called three expert witnesses who testified to the fair market value of the large diamonds in the two rings and of the ear clips. The qualifications of these witnesses were not questioned. They were diamond merchants of many years experience whose principal business was dealing at wholesale in unmounted diamonds but who also had had some experience in selling diamonds at retail. The first witness, Milner, [fol. 97] from whom, as we have said, Mrs. Publicker had purchased the ring in 1946, set a value of $46,650 on it, of which $46,125 represented the value of the large stone and

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[2] These were the net amounts claimed in connection with these gifts. The total deficiences asserted were greater but included amounts unrelated to the present controversy. See Transcript of testimony, pp. 3-4.

$500 the value of the two bullet-shaped stones and the setting. On the 1947 gifts Milner set values of $109,000 for the ring and $5500 for the ear clips. In determining these amounts, Milner did not take into consideration the Federal Excise Tax.

The second witness, Sommer, stated that the value of the 1946 gift was $46,125 for the diamond, which, at the time of his appraisal, had been removed from its setting. On the 1947 gifts he set values of $73,590 for the ring and $5000 for the ear clips. These appraisals were exclusive of Federal excise tax and of the ten per cent mark-up which Sommer's firm ordinarily charged on resale of diamonds purchased.

The third witness, Sumnick, testified that he would pay $51,250 for the large diamond in the 1946 gift, $117,000 for the large diamond in the 1947 ring and $5000 for the ear clips. These amounts were exclusive of the Federal excise tax and of any mark-up on resale of the diamonds to a retailer. Sumnick testified that he would probably sell the diamonds at a profit of about ten per cent to one of the few retail houses handling diamonds of such size and that on resale at retail these houses would in turn add a mark-up of indeterminate amount, depending on the means and enthusiasm of the ultimate purchaser.

Also included in the taxpayer's evidence was a letter from Harry Winston, Inc., the seller of the 1947 gifts, in which it was stated that as of July 8, 1947, Mrs. Publicker might "with some effort . . . be able to procure $115,000 in the present market" for the 1947 ring. The ear clips were considered salable for $6000. No mention was made of the Federal excise tax. This letter had been attached by Mrs. Publicker to her 1947 gift tax return.

Cross examination of the taxpayer's witnesses developed the fact that even among the large wholesale and retail [fol. 98] diamond merchants, sales of diamonds of the size of those here involved were extremely rare. Milner, however, admitted that between 1941 and 1946 there was an appreciation in the value of large diamonds amounting to about twenty per cent.

The Commissioner's evidence of fair market value consisted of the testimony of one expert witness, Lauterbach, who was a jewelry appraiser of wide experience but who

had never been in the business of buying and selling diamonds. He stated that the value in the retail market of the 1946 gift was $90,000 and of the 1947 ring $201,000, exclusive of Federal excise tax. In reaching these figures Lauterbach emphasized the perfection of the large stones and the impossibility of duplicating them in case of loss. He gave no opinion as to the value of the ear clips. The Commissioner also relied in part upon the stipulated cost to Mrs. Publicker of the gifts as indicative of their fair market value.

The Tax Court considered cost the best evidence of value, in view of the irreconcilable conflict between the testimony of the expert witnesses. The Tax Court's valuations appear to be based entirely on cost except that in the case of the 1946 gift twenty per cent of the cost (not including Federal excise tax) was added to indicate an appreciation in value between 1941 and 1946.

Does this record reveal either a mistaken selection of the criteria of value by the Tax Court or such disregard of Mrs. Publicker's evidence as to render the findings clearly erroneous?

The taxpayer contends that it was error for the Tax Court to place much reliance on evidence of these diamonds' value in a "retail market" since no such market existed or exists for gems of such size and uniqueness. Mrs. Publicker asserts that the only ready market in the field of large diamonds is among dealers, and that this market alone should be considered in valuing the 1946 and 1947 rings, if not the ear clips. The Tax Court said, however, that it was not [fol. 99] shown "that there is any more of an established wholesale market than there is a retail market." We think this a fair comment on the evidence. The testimony of the taxpayer's witnesses shows that there were at least three dealers willing to purchase these large stones for various prices. It does not show that there were not also individuals who might buy them. The taxpayer admits that there are a few such individuals, perhaps as many as there are firms dealing in such unusual stones. While it may be true that the speediest and most convenient way to dispose of a large diamond is by sale to an established dealer, wholesale or retail, the possibility of a more favorable private sale cannot be entirely eliminated. The apparent willingness of

Mrs. Publicker's witnesses to purchase the diamonds for the values they set at least implies their confidence in an available market for resale, either to another dealer *or* to an individual. Moreover, Treasury Regulations 108 § 86.19 (a), removes from consideration elements suggesting compulsion in determining whether a sale, actual or possible, is evidence of value. We think Mrs. Publicker places undue emphasis on the necessity for a "ready" market for the diamonds.

The fact that a piece of property is unique does not in our view establish that there is no market for that property. The statute, and the regulations, cannot be limited to apply only to fungible goods. Every piece of land and many paintings are unique. Large diamonds may not exist to any appreciable extent in the retail market, but there remains a market, however limited, for any particular large diamond, and that individual buyers are a part of that market is shown by Mrs. Publicker's purchase of the gifts here involved.

While it is true that "value" in the statute is now commonly taken to mean "fair market value" as mentioned in the regulation, we do not propose to limit the scope of the statute by too strict a view of the required market for the various kinds of property taxed. The regulation also pro-
[fol. 100] vides that, "The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, . . . All relevant facts and elements of value as of the time of the gift should be considered."

Guggenheim v. Rasquin, 312 U. S. 254 (1941), lends support to this conclusion. In that case the property valued, a single premium life insurance policy, had no realizable market value equivalent to the cost of the policy to the donor. The Supreme Court, nevertheless, held the value of the entire bundle of rights in the policy to be its cost to the donor, stating: "Cost is cogent evidence of value. . . . Cost in this situation is not market price in the normal sense of the term. But the absence of market price is no barrier to valuation." See 312 U. S. at p. 258. If this is the applicable law, the Tax Court's approach in the instant case is correct, for here cost and market value realizable

on sale of the diamonds to an individual for his personal use might well have been substantially the same.

Heiner v. Crosby, 24 F. 2d 191 (3rd Cir. 1928), cited by Mrs. Publicker, is not to the contrary despite the statement contained in the opinion that "sales in a restricted market, may [not] signify a fair market price or value . . ." In that case shares of stock were involved. The normal market for these shares, fungible items, had been artificially restricted and depressed by monopolistic practices on the part of the controlling shareholders. This court properly preferred to use the value of the corporate assets and evidence of a bona fide private offer for the stock rather than rely exclusively on the price on the Pittsburgh Stock Exchange in determining the value of the stock. In the instant case, there was no showing that the available market, though narrow, was less than the normal market for the diamonds and was therefore not capable of producing the best price to be obtained.

[fol. 101] The taxpayer also contends that whatever the market, the market value must be "fair" and that in the instant case it is apparent that she was overreached in her purchase of the 1947 ring. Her argument appears to be that not only did she pay more than the ring was worth in February of 1947 but that five months later, on the date of gift, no other purchaser could have been induced, short of fraud, to pay a like amount for the ring. There is no evidence of fraud in her original purchase as the Tax Court noted in relying on cost to establish value. Moreover, it was for the Tax Court to determine what weight should be given to the opinions of Mrs. Publicker's experts and to the letter from Harry Winston, Inc., received a few days before the 1947 gift was made to her daughter. We think that the Tax Court's decision to disregard the conflicting expert testimony in preference for undisputed evidence of an actual sale of the identical property here involved was not erroneous. The Tax Court could properly have considered that five months after the purchase by Mrs. Publicker of the 1947 ring another purchaser might well have considered the ring worth the amount paid by Mrs. Publicker.

The Tax Court may have had in mind that the intangible elements of enjoyment in ownership of the world's rarities

probably do enhance their value. Cf. Guggenheim v. Rasquin, *supra*. The fact that such elements vary among owners does not discount their importance. The variance serves the more strongly to remind the fact finder that in determining gift tax valuations reliance upon concrete evidence in the form of actual sales is desirable.

What we have said applies in large part to the 1946 gift also. In the purchase of both gifts the only unusual circumstances discounting reliance on the isolated sales as indicative of value were the nature of the commodity purchased and the wealth of the purchaser. We do not think that these unavoidable circumstances in dealings in large diamonds are sufficient to preclude a court from using cost [fol. 102] to ascertain value. The purchase of the 1946 gift of course preceded the date of gift by five years, but Mrs. Publicker does not contend that remoteness of the purchase destroys its worth as evidence of value in 1946. Her own expert stated that the value of large diamonds rose about twenty per cent during those five years. The Tax Court properly took this testimony into account in determining the value of the 1946 gift.

A more difficult problem remains—whether it was proper for the Tax Court to include in value that part of Mrs. Publicker's cost of the gifts which represented the federal excise tax. The instant case aside, we can find but three decisions on this question, all holding the excise tax includible. There are two decisions by the Tax Court, Gould's Estate, 14 T. C. 414 (1950) and Duke's Estate, CCH Dec. 18,705 (M), 10 TCM 1175 (1951), and Duke v. Commissioner, 200 F. 2d 82 (2d Cir. 1952). In the instant case the Tax Court considered its decision in Gould controlling.

The Federal excise tax was imposed upon jewelry by virtue of 26 U. S. C. A. § 2400 and the rate of this tax was set at twenty per cent as of April 1, 1944. See 26 U. S. C. A. § 1650. Prior to that date the rate was ten per cent. The tax applies only to sales at retail and is collectible and returnable by the retail seller. 26 U. S. C. A. § 2403(a). The tax is levied upon the retail price, and in determining, "for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge

incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge." 26 U. S. C. A. § 2403(c). A penalty is imposed for representation to a purchaser that the seller's charge does not include the tax. "Whoever in connection with the sale or lease, or offer for sale or lease, of any article taxable under this chapter, makes any statement, written or oral, in advertisement or otherwise, intended or [fol. 103] calculated to lead any person to believe that the price of the article does not include the tax imposed by this chapter, shall on conviction thereof be punished by a fine of not more than $1,000." 26 U. S. C. A. § 2409.

The provisions last quoted are emphasized by note 1 cited to the text, 200 F. 2d at p. 84, in Judge Frank's opinion. The words quoted apparently mean that for purposes of the excise tax Congress wished the advertised or stated price of the articles covered by the tax to include the amount of the tax. In short, there is to be one price for the article which is to include the tax and, in effect, the tax is not to show insofar as members of the purchasing public are concerned. But the amount of the tax is to be made apparent when the seller makes his return and pays the excise tax for the amount of the tax must be stated in connection with the price of the article sold. It should be pointed out again, however, that the pertinent gift tax regulation, quoted above, states that "the value of the property" shall be the *price* at which the property would change hands between "a willing buyer and a willing seller". It is contended by the respondent that since the excise tax law requires the value of the property plus the excise tax to constitute price, it must follow that the amount of the excise tax must be included in the value of the property for gift tax purposes. As we understand it this was the ground on which the Tax Court decided the Gould case. We will state what we believe to be the Tax Court's view.

Judge Murdoch, writing for the majority of the Tax Court in the Gould case [3] chose the example of a carton of cigarettes purchased by an individual for a friend and states that "the man on the street" regards the excise tax on

[3] Six Judges dissented.

cigarettes as part of the cost of an article. Judge Murdoch goes further and considers that the man on the street would also deem the tax to be part of the "purchase price" of the [fol. 104] cigarettes. It is true that such a conclusion is a practical one for one cannot buy cigarettes without paying the tax. It can also be argued that since one cannot buy a diamond at retail without paying the tax the tax is part of the price of the diamond.[4] But it is indeed an odd conception to say that an excise tax is part of the value of an article whether the tax be paid or unpaid.[5]

Theoretically, if the position of the Tax Court in the Duke and Gould cases be accepted, each time a diamond is sold at retail it acquires as an additional value the amount of the excise tax paid by the seller. If a diamond worth $100 is sold at retail ten times, excise taxes being passed along to each successive purchaser, it would seem to follow under the Tax Court's reasoning that the value of the stone, for no other reason than the successive impositions of the excise tax, would be over $300. Theoretically also, if an excise tax becomes part of the *value* of a diamond sold at retail, the successive gift taxes imposed upon it by reason of several gifts should cause it to increase in value.

Both the gift tax statute and the excise tax statute deal with taxable events. The passing of property by inheritance is also a taxable event. One must look to the value of the property at the time of the happening of the taxable event and determine the amount of the tax, whether gift or estate. Of course, as to excise tax one looks to the retail price. An excise tax is imposed when jewelry is sold at retail and the

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[4] We note that "price" is used in inconsistent ways in §§ 2403(c) and 2409. § 2403(c) excludes the excise tax from "price." § 2409 imposes a penalty for representing that the price does not include the excise tax. This last use is in conflict with the construction of the gift tax regulations favored by the six dissenting Judges in the Gould case.

[5] Contrast the provisions of Section 1009, Title 26, to the effect that the gift tax, " . . . shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made.", and "If the tax is not paid when due the donee of any gift shall be personally liable for such tax to the extent of the value of such gift."

amount of the tax becomes part of the "price" by statute. But may we say that when property passes by gift that it is anything other than the naked value of the gift at the [fol. 105] time of the happening of the taxable event that determines the amount of the gift tax? So also with the estate tax. Otherwise taxation on taxation could ensue. We cannot conclude that Congress meant to dovetail the excise tax with the gift tax simply because Section 2409 of the exercise tax prohibits the seller from representing that "the price of the article does not include the tax." But there are other considerations as we will point out in a succeeding paragraph.

The majority of the Tax Court criticize the argument that Treasury Regulations 108 Section 86.19(c) prescribing the use of stock market quotations in valuing gifts of shares of stock, apparently authorizes the use of these quotations without adding the taxes incurred in the actual transfer of shares. We may take judicial notice of the fact, as could the Tax Court, that the prices commonly quoted for stock exchange transactions do not include these taxes. In other words, as we read the regulation last referred to, not all of the cost to the purchaser of a share of stock is included in the value of the stock for gift tax purposes. We think the Treasury Regulations relating to stock may reflect the sounder public policy, as the petitioner contends, but such questions are for Congress and not for the courts.

We conclude that the decision of the Tax Court must be affirmed. Our conclusion is based primarily on the ground that the applicable Treasury Regulations 108, Section 86.19, dealing with the valuation of property for gift tax purposes states that "The value of the property is the price at which such property would change hands between a willing buyer and a willing seller. . . ." The gift tax regulation provides therefore, however inconsistently, for valuation of the property as if the tax incidence were based on a sale and not on a gift. Obviously, valuing the property as a sale, the amount of the excise tax must be included for both the buyer and the seller would have in mind and necessarily would calculate the amount of the excise tax as part of the cost of the property.

[fol. 106] The substance of the presently applicable regu-

lation, viz., Regulations 108, Section 86.19, has been included in the Treasury Regulations relating to the gift tax since they were first promulgated on October 3, 1933, under the number Treasury Regulations 79 (1933). The regulation therefore has received the sanction of Congress in the amendments effected to the Act and as part of the present Internal Revenue Code. See United States v. Dakota-Montana Oil Co., 288 U. S. 459, 466 (1933); Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 115 (1939); Commissioner v. Flowers, 326 U. S. 465, 469 (1946). The validity of the regulation has not been seriously attacked by the petitioner.

It should also be borne in mind that the construction which we have effected seems to fit well into the congressional pattern of gift tax and excise tax. It would seem to follow that Congress had in mind the consistent statutory pattern whereby the amount of the excise tax should be included in ascertaining the value of an article, at least when as here only one excise tax is involved.

Accordingly, the decision of the Tax Court will be affirmed.

GOODRICH, Circuit Judge, dissenting in part:

With the conclusion that the decision of the tax court is not clearly erroneous on the general question of value in this case I have no disagreement. But I cannot go along with the addition of United States excise tax to sale price in ascertaining value. The reason is well set out in the discussion found in the majority opinion. If Mrs. Publicker gave these diamonds to her daughter and her daughter gave them to a friend and that friend gave them to another friend there would not, I take it, be additional sums added to value as a result of each transfer. But if the diamonds went through this same number of sales transactions somehow [fol. 107] or other the value is supposed to be increased by the amount of tax involved in each instance. That seems to me to be incongruous. Some incongruities are unavoidable in tax law but this is one which seems to me as avoidable as it is obvious.

A true Copy: Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 108] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,951

ROSE PUBLICKER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review a Decision of the Tax Court of the United States

Present: Biggs, Chief Judge, and Maris and Goodrich, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

Harriet G. Humphrys, Deputy Clerk.

July 16, 1953.

(Received and filed July 16, 1953, Ida O. Creskoff, Clerk.)

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 10,951.

ROSE PUBLICKER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition to Review the Decision of the Tax Court of the United States.

PETITION FOR REHEARING ON BEHALF OF PETITIONER AND BRIEF IN SUPPORT THEREOF.

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JUL 31 1953

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PETITION FOR REHEARING ON BEHALF OF ROSE PUBLICKER, TAXPAYER PETITIONER.

The taxpayer, petitioner on review from the Decree of the Tax Court of the United States, respectfully requests that the Court grant a rehearing of her petition to review the decision of the Tax Court and submits that the question presented is of such importance and novelty as to warrant hearing and determination by the Court *en banc*. Judge Goodrich dissented to this Court's affirmance of the Tax Court in an important feature of this case, to which the first three of the following points are directed—and on that aspect of the case the decisions of both this Court and the Tax Court were grounded largely on a prior decision of the Tax Court, to which, of those judges who sat, six judges dissented.

Rehearing is requested on the following grounds:

1. The Court's determination of what it styled the more difficult of the two problems presented by the case indicates (Opinion, page 9) that the Court regarded as decisive Section 2689 of the Internal Revenue Code which was not argued before the Court, and which moreover we believe can be demonstrated to be irrelevant and has, we submit, been erroneously interpreted in the Opinion.

2. The Court based its determination upon the premise that inasmuch as the property must be valued as a sale the amount of the excise tax must be included because "both the buyer and the seller would have in mind and necessarily would calculate the amount of the excise tax as part of the cost of the property" (Opinion, page 12).

Petitioner's argument at pages 19-20 of her original brief, which demonstrates the fallacy of this premise, did not receive the Court's notice.

3. As respects the 1945 gift, the Court included as part of fair market value a Federal excise tax which was neither

the tax rate which would have been applied at the time of the gift nor the amount of tax which would have been charged at the time of purchase based on the fair market value as found by the Tax Court and approved in the Opinion. The Court has therefore accepted as a standard of value, an amount arrived at by a method contrary to the Gift Tax Act and to the Regulations and in so doing has apparently not considered petitioner's argument on page 20 of her original brief.

4. Finally, as a ground admittedly of less general or widespread significance, although of course of vital importance to petitioner, in affirming the Tax Court's determination of value (irrespective of the question of the excise tax) the Opinion erroneously stated petitioner's position as being that the only ready market in the field of large diamonds is among dealers. The Opinion disregarded the testimony of petitioner's witnesses which clearly established that the values set by the dealers contemplated sale to anyone, including individual buyers. Their testimony, constituting the only evidence in the case of a market for large diamonds, was disregarded by this Court, which substituted its speculation as to the existence of "another market." It is submitted that the foregoing constitutes such disregard of petitioner's evidence of value as to make the conclusions clearly erroneous.

Respectfully submitted,

EARL JAY GRATZ,
Attorney for Petitioner.

Certificate.

I hereby certify that the foregoing petition is in my opinion meritorious, is presented in good faith and that it is not interposed for the purposes of delay.

EARL JAY GRATZ,
Attorney for Petitioner.

PETITIONER'S BRIEF IN SUPPORT OF HER PETITION FOR REHEARING.

The opinion of the Court, written by Chief Judge Biggs, was concurred in by Judge Maris. (Judge Goodrich filed a dissenting opinion in which he objected to the addition of the United States excise tax to the sale price in ascertaining value. The phase of the case discussed in the dissenting opinion is the basis of petitioner's first three objections now urged for the attention of the Court *en banc.*)

The question is a novel one. The decision of the Tax Court, which this Court affirmed, had on this point been based entirely upon the decision of the Tax Court in *Estate of Frank Miller Gould v. Commissioner,* a case of first impression in which six members of the Tax Court dissented.[1] Only one appellate court, The Court of Appeals for the Second Circuit, in a case involving plainly distinguishable facts, has considered the question presented here, viz:

> In the determination of the value of gifts for tax purposes, may an amount additional to the fair market value and representing Federal excise tax paid upon the original purchase by donor in addition to the original price, be added to fair market value as found at the time of the gift?

The facts are stated briefly on pages 2-4 of the opinion.

1. The Court's determination of what it styled the more difficult of the two problems presented by the case indicates (Opinion, page 9) that the Court regarded as decisive Section 2409 of the Internal Revenue Code, which was not argued before the Court. We believe this section

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1. Strong dissenting opinions were written by Judges Disney, Harron and Johnson. Judges Arundell, Van Fossan and Arnold each concurred in one or more of the dissents.

can be demonstrated to be irrevelant and we submit that it has been erroneously interpreted in the Opinion.

The ultimate question in the case is the determination for the purposes of the gift tax of the value of the gifts. The gift tax on jewelry is assessed against "the value thereof at the date of the gift."[2] The Regulation provides that the value of the property is the price at which such property would change hands between a willing buyer and a willing seller.[3] The crucial question is therefore what is the price at which the gift would have changed hands on the date of the gift. The Excise Tax Act imposes on jewelry sold at retail a tax equivalent to 20% (prior to 1944, 10%) of the *price* for which sold.[4] Despite this plain statutory recognition of the fact that the tax is additional to price and added to the price, the Court points to a section of the Act which has no purpose other than to require the tax to be passed on to the purchaser (by preventing the seller from representing that it is not passed on) and invokes this clause as demonstrating that the Excise Tax law requires that the value of the property plus the excise tax constitute price.

Section 2409 provides:

> "*Penalty for representation that tax is not passed on.* Whoever in connection with the sale or lease, or offer for sale or lease, of any article, taxable under this chapter, makes any statement, written or oral, in advertisement or otherwise, intended or calculated to lead any person to believe that the price of the article does not include the tax imposed by this chapter, shall on conviction thereof be punished by a fine of not more than $1,000."

It seems clearly evident that the Congress did not intend, in using the word *price* in a general sense in Section

2. Internal Revenue Code, Sec. 1005.
3. Regulations 108, Sec. 86-19(a).
4. Internal Revenue Code, Ch. 19, Sec. 2400.

3409, to establish a concept which should override the plain words of Section 3400. Indeed, unless price is determined before the tax, there is nothing upon which the tax can be calculated. Section 3405 provides that, *in determining for the purposes of the Act* the price for which an article is sold, the amount of tax imposed whether or not stated as a separate charge shall be excluded.

The Court's view is plainly at odds with this Section. The Opinion states (at page 10):

> "The words quoted apparently mean *that for purposes of the taxes* Congress wished the advertised or stated price of the articles covered by the tax to include the amount of the tax. In short, there is to be one price for the article which is to include the tax and, in effect, it is up to the seller to show inside a number of the purchasing public are concerned." (Italics supplied.)

It is submitted, however, that by reason of Section 3405 the contrary is plainly true. Congress obviously contemplated the establishment of a price by a retailer to which the taxes would be added as a percentage thereof and Congress expressly sanctions the usual and customary business practice of separately stating the tax and in fact requires it in the retailer's return. The only possible reason for Section 3409 and the intent of the Congressional intent as evidenced by its title, was to prevent misrepresentation by sellers that the tax was not being passed on, i.e., to misrepresentation that the tax would be paid out of the seller's profit. If the seller were permitted to absorb the taxes as a matter of choice, the argument might be made for the Court's conclusion that the tax is somehow added to the value of the article. Under Section 3409, however, the seller must appreciate the fact that the seller has not paid and cannot pay the tax, which to the contrary is required to be passed on to the buyer in addition to the price paid the dealer. To construe this section as intended to determine what is value for all tax purposes is so evidently to exten the pass

meaning of the Act as to be in effect to write a new section. The stated Congressional purpose is to prevent the seller from representing that he is absorbing the tax. The conclusion read into it by the Court (Opinion, page 13) that "Congress had in mind the consistent statutory pattern whereby the amount of the excise tax should be included in ascertaining the value of an article . . ." is not even remotely indicated by the Section.

The Court pointed out (Opinion, page 11):

> "it is indeed an odd conception to say that an excise tax is part of the value of an article whether the tax be paid or unpaid."

It seems an even less justifiable conception to say that an excise tax must be *included* as part of the price of an article for the purpose of an Act which expressly states that for the purposes of the Act the price shall *exclude* the tax, especially when the tax cannot be calculated in the first place until the price has been determined.[5]

2. The Court based its determination upon the premise that inasmuch as the property must be valued as a sale, the amount of the excise tax must be included because "both the buyer and the seller would have in mind and necessarily would calculate the amount of the excise tax as part of the cost of the property" (Opinion, page 12).

Petitioner's argument at pages 19-20 of her brief, which demonstrates the fallacy of this premise, received no notice in the opinion.

Basic to the Court's decision is the conception that the excise tax is part of the price, but in arguing that both the buyer and seller would necessarily calculate the amount

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5. In a special ruling published by telegram on December 20, 1949 (505 CCH, Sec. 6062) the Commissioner advised that the Excise Tax Law upon furs did not prohibit a retailer from advertising fur coats at stipulated prices subject to 20% federal excise tax, the price tag including the promise to give credit if the tax were reduced or repealed within a specified period of time. The promise was regarded merely as a *price* adjustment resulting in redetermination of tax liability on the basis of a revised sale price. This ruling is plainly contrary to the present decision.

of the tax as part of the cost, the Opinion is led to a conclusion which is contrary to fact and contrary to economic theory. The tax forms no part of a private sale so that if petitioner had sold the stones rather than made gifts of them there would have been no excise tax paid. Yet the value of the stones could in no sense be said to be changed merely because they were given rather than sold to an individual.[6] Moreover, the excise tax by definition is not a part of the price demanded by the seller and paid by the buyer, even in a retail sale. To the contrary, the seller must determine his price and then apply the percentage in order to determine the excise tax. The retailer obtains no benefit from the tax which he merely collects for the Government.

As was pointed out at page 20 of petitioner's brief, but not disposed of by the Opinion:

> ". . . in considering what is meant by a 'willing seller' in the definition in Regulations 108 Section 86.19, we must recognize that the seller in a retail sale has become induced or willing to part with his property, knowing full well that he will receive therefor only the

6. If petitioner, instead of giving the 1947 gift to her daughter, had on the date of the gift sold it to a stranger for exactly the same price that she had paid for it five months previously, viz. $200,000.00, the transaction would, of course, have involved no excise tax inasmuch as the tax applies only to a retailer. If her purchaser immediately made a gift of the stone and declared its value for gift tax purposes as $200,000.00, it is indisputable its declared value would have been immune to attack. Neither the Government nor the Government's witness contended that the fair market value of the 1947 gift in this case was in excess of $200,000.00, *before tax*. It would be preposterous if identical stones both bought at retail for $200,000.00, plus $40,000.00 excise tax, would in a transfer on the same day have a fair market value of $200,000.00 if sold to an individual, but $240,000.00 if disposed of by gift. It could not be reasonably contended in the supposed case that petitioner would have obtained less than fair market value in the private sale merely because she had not recouped the tax paid by her to the retailer. She is not required to pass it on nor is she required to collect the tax for the Government on private sale. She has received the full fair market value, even according to the view of the Government's expert witness, upon receiving the price the dealer charged her, viz. $200,000.00.

Judge Goodrich pointed out in his dissenting opinion (Opinion, page 13) that a series of gifts would not result in added value and considered it an obvious and avoidable incongruity to hold that upon a number of sales the value would be somehow increased by the the amount of tax involved. The foregoing situation presents at least an equally incongruous result which seems clearly to be required by the Opinion.

price charged, and not the price plus the excise tax imposed upon the transaction. It is the price alone therefore that causes the seller to part with his property."

Not only does the Court disregard this self-evident proposition, but it also adopts the contrary as the premise for its conclusion and we submit that the conclusion is therefore clearly erroneous.

3. The statutory guide imposed by Section 1005 of the Internal Revenue Code for the assessed value of a gift is "the value at the time of the gift." As has been shown, the Regulations interpret this as the price at which the property would change hands between a willing buyer and a willing seller. In this instance, the Opinion would substitute as a measure of the value of the 1946 gift the cost to the donor increased by an amount purportedly representing the increase in value of jewelry between the date of the purchase and date of the gift to which is added the excise tax actually paid by the donor on the lesser of these amounts. The anomaly of this conclusion was anticipated in petitioner's brief at page 20, but insofar as is apparent from the Opinion, petitioner's reasoning was ignored. It is evident, however, from the Opinion that the anomaly is avoided only by begging the question. If the excise tax is to be included as a part of value at the time of the gift, it should be calculated at 20%. The Court did not seek to impose this rate of tax, yet the 10% rate did not apply at the time of the gift. On the other hand, assuming that the tax actually paid for the purchase of the ring was a part of the cost, what basis in logic is there for disregarding this tax as a part of the cost in determining the alleged extent to which diamond prices have been inflated by the time of the gift? By this means the Court does, it is true, avoid the dilemma of assessing a fictitious amount of tax, but in so doing it is inescapably applying inconsistent standards in determining value. If the cost at the time of the purchase repre-

sented value then, an increase in value should be applied to the total cost. What the Court seems to have concluded is that the original tax, while a part of cost, was not a part of value for the purpose of determining present value, but must nevertheless be considered a part of value to the extent it was actually paid.

This, it is submitted, renders Regulations 108, Section 86-19(a) meaningless inasmuch as value is by definition there declared to be the price at which the property would change hands on the date of gift. If the excise tax paid by the donor became a part of cost, this cost, which the Court has stated becomes the price, will be the only logical base to which to apply any inflationary increase in value for the purpose of determining the price as of the date of gift. The result reached by the Opinion has no warrant in the Regulations. In fact, as the Opinion points out a companion section of the Regulations expressly applies to the valuation of gifts of stock the rule urged by petitioner. Nothing in the Regulations prevents this Court from giving to Section 86-19(a) in this case precisely the same effect which the Commissioner has more explicitly applied to stocks in Section 86-19(c). There would be no reason to refer the question back to Congress as was suggested in the Opinion at page 12, if the Opinion had not strained a "Congressional intent" out of Section 2409 which has no clear basis in either Act or Regulations.

4. It is not petitioner's purpose to reargue the evidence. Suffice it to say that petitioner's witnesses placed values upon the diamonds which represented the retail price to *anyone,* including to an individual for personal use. The witnesses, therefore, contemplated a sale to just such an individual buyer as petitioner. Petitioner did not argue and there is no justification for the conclusion that there is no market for large diamonds. The evidence is plain, however, that the individual buyer for large stones is a rarity and that only a dealer can expect to develop a market for

such a gem. Even then buyers are not easily or frequently found. Both of petitioner's purchases had been made from dealers. But it is perfectly plain from previous decisions of the courts that an isolated sale does not constitute evidence of a market.

The opinion departed from the evidence and entered the field of sheer speculation when it stated "the possibility of a more favorable private sale cannot be entirely eliminated" (Opinion, page 6), and that "cost and market value realizable on the sale of the diamonds to an individual for his personal use might well have been substantially the same" (Opinion, page 7).[7] The evidence was entirely to the contrary.

CONCLUSION.

It is respectfully submitted that the importance of the question of whether the Federal excise tax can be properly added to price to determine value for gift tax purposes justifies rehearing of this case by the Court *en banc*, and that the strong dissents by six members of the Tax Court to the initial statement of the challenged principle, as well as the terse and positive disapproval by Judge Goodrich in this case, emphasize the serious doubt still existing as to the correctness of the decision and we earnestly submit that rehearing and reconsideration should be granted upon the foregoing grounds.

EARL JAY GRATZ,
Attorney for Petitioner.

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7. As was demonstrated *supra* in footnote 6 on a sale by petitioner to an individual there would be no tax. Excise tax, to whatever extent it figured as part of petitioner's "cost", is not a part of the fair market value in either a private resale or a gift.

[fol. 110] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,951

ROSE PUBLICKER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

SUR PETITION FOR REHEARING

Present: Biggs, Chief Judge, and Maris and Goodrich, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court: Biggs.

Dated: August 19, 1953.

(Received and filed Aug. 19, 1953, Ida O. Creskoff, Clerk.)

[fol. 111] United States of America, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Tax Court of the United States, Greeting:

Whereas, lately in the Tax Court before you or some of you, in a cause between Rose Publicker, Petitioner, (Petitioner on Review) and Commissioner of Internal Revenue, Respondent (Respondent on Review) Tax Court Docket No. 28,356—a decision was entered in the Tax Court on August 21, 1952, which decision is of record in the office of the said Tax Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by inspection of the record of the said Tax Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of a petition by Rose Publicker agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

July 16, 1953.

(Received and filed Aug. 25, 1953, Ida O. Creskoff, Clerk.)

[fol. 112] [Endorsed:] Tax Court Docket No. 28,356. No. 10,951. Rose Publicker, Petitioner on Review vs. Commissioner of Internal Revenue, Respondent on Review. Mandate. (Received and filed August 25, 1935, Ida O. Creskoff, Clerk.)

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said petition notwithstanding.

Signed and sealed this 25th day of August in the year of our Lord one thousand nine hundred and fifty-three.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

[fol. 113] Clerk's Certificate to foregoing transcript omitted in printing.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 470

ROSE PUBLICKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 92–103) is reported at 206 F. 2d 250. The memorandum findings of fact and opinion of the Tax Court (R. 81a–84a) are not reported.

JURISDICTION

The judgment of the Court of Appeals (R. 104) was entered July 16, 1953. A petition for rehearing (R. 105–116) was denied August 19, 1953 (R. 117). The petition for a writ of certiorari was filed November 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the evidence supports the findings of the Tax Court as to the value, for gift tax purposes, of certain gifts of jewelry made by taxpayer to her daughter.

2. Whether the court below erred in approving the Tax Court's inclusion of federal excise taxes, paid by taxpayer at the time of purchase, in the value of the gifts involved.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

CHAPTER 4—GIFT TAX

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *

(26 U. S. C. 1946 ed., Sec. 1000.)

SEC. 1005. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

(26 U. S. C. 1946 ed., Sec. 1005.)

Treasury Regulations 108, promulgated under the Internal Revenue Code:

> SEC. 86.19. *Valuation of Property.*—(a) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.
>
> * * * * *

STATEMENT

In 1946, the taxpayer, Rose Publicker, made a gift to her daughter of a diamond ring which she had purchased in 1941 for the sum of $45,000, plus 10 percent thereof, or $4,500, to cover the retailers' excise tax imposed at the then applicable rate upon the seller by Section 2400 of the Internal Revenue Code, as amended, with respect to the sale. In 1947 the taxpayer made a gift to her daughter of a diamond ring

and a pair of diamond ear clips which she had purchased earlier in that year for the sum of $200,000, plus 20 percent thereof, or $40,000, to cover the retailers' excise tax imposed at the then applicable rate upon the seller by Section 2400 of the Internal Revenue Code, as amended, with respect to that sale. (R. 81–82.)

In her gift tax return for 1946, the taxpayer reported the 1946 gift to her daughter at a value of $50,000, and in her 1947 return she reported the gift in that year at a value of $121,000. (R. 81.) Thereafter, upon audit, the Commissioner of Internal Revenue determined the value of the taxpayer's gift to her daughter in 1946 to be $100,000 at the date of gift, and the value of her gift to her daughter in 1947 to be $240,000 at the date of gift, the latter figure being the amount paid by the taxpayer, including federal excise tax, for the ring and ear clips a few months previously. The Commissioner thereupon asserted the deficiencies in gift tax here involved. The taxpayer petitioned the Tax Court for a redetermination of her gift tax liability for the two years, and the Tax Court, after a full hearing, found that the value of the taxpayer's 1946 gift to her daughter was $58,500 and that the value of the taxpayer's 1947 gift to her daughter was not less than $240,000. (R. 81–82.) On review these findings were sustained by the court below. (R. 92–103.)

ARGUMENT

1. Section 1000 of the Internal Revenue Code, *supra,* p. 2, imposes a tax, computed in accordance with Section 1001 of the Code, upon the transfer of property by gift. Computation of the tax in accordance with Section 1001, as amended by Section 402 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, requires application of a graduated rate of tax to the amount of all such gifts made during the taxable year. Section 1005 of the Code, *supra* p. 2, further provides that if the gift is made in property, "the value thereof at the date of the gift shall be considered the amount of the gift."

Before the Tax Court, the taxpayer relied primarily upon the opinion testimony of certain diamond merchants and dealers to establish values for these gifts as of the crucial dates in amounts less than the values determined by the Commissioner. The Tax Court, rejecting such testimony, chose to accept the evidence of cost to the taxpayer of the items of jewelry in question as the basis for its determination of value for gift tax purposes. It found the value of the 1946 gift to be $58,500 by adding to the purchase price (*i. e.,* $45,000 plus the federal excise tax of $4,500 collected from her by the dealer), which the taxpayer paid for the ring in 1941, an amount equal to 20 percent of the $45,000, which one of the

taxpayer's witnesses testified represented the appreciation in the value of diamonds of that size between 1941 and 1946. The Tax Court also found the value of the 1947 gift to be not less than $240,000, which was the amount, including the federal excise tax, paid for the ring and ear clips by the taxpayer a few months prior to the date of the gift. (R. 83–84.)

The value of property at a given date for federal tax purposes is a question of fact to be determined from the evidence. *Heiner* v. *Crosby,* 24 F. 2d 191, 193 (C. A. 3d); *Gloyd* v. *Commissioner,* 63 F. 2d 649, 650 (C. A. 8th), certiorari denied, 290 U. S. 633; *Texas-Empire Pipe Line Co.* v. *Commissioner,* 141 F. 2d 326, 327 (C. A. 10th). With respect to gift taxes, Section 86.19 of Treasury Regulations 108, *supra,* p. 3, provides that—

> The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. * * * All relevant facts and elements of value as of the time of the gift should be considered.

In fixing the value of the gifts here in issue, the Tax Court took into consideration all relevant facts and elements of value, and it is clear that its findings are supported by substantial evidence. Accordingly, the only question presented is whether the Tax Court used the proper

criteria, or standards, in making its findings. *Powers* v. *Commissioner,* 312 U. S. 259, 260. It has long been recognized that the price at which property was sold at or near the critical date is cogent evidence of value. *Guggenheim* v. *Rasquin,* 312 U. S. 254, 257–258.

The taxpayer's present criticism of the Tax Court's decision seems not to be so much its failure to find values based on the opinion testimony of her witnesses, as the fact that that court took into consideration, as one of the factors on which it predicated its findings of value, the amount which the taxpayer was required in each instance to pay as federal excise tax imposed upon the dealers from whom she purchased the rings and ear clips (Pet. 4–5). In this respect, the instant case presents the same problem as that presented in *Duke* v. *Commissioner,* 200 F. 2d 82 (C. A. 2d), certiorari denied, 345 U. S. 906, the only difference being that in the latter case the only evidence of value adduced was the price, including excise tax, which the taxpayer paid for the property shortly before the date of the gift. In that case the Court of Appeals for the Second Circuit, as did the court below in the instant case, expressly approved the action of the Tax Court in taking into consideration the federal excise tax paid by the donor in determining the value of jewelry for gift tax purposes.

Taxpayer's attack on the Tax Court's inclusion of the amounts of the federal excise taxes in the

purchase price of the gifts involved in this case is (as it was in the *Duke* case, *supra*) based on the hypothesis that such inclusion results in the imposition of a tax upon a tax (Pet. 4, Br. 8–9). The argument is grounded on a fundamental misconception of the federal retailers' excise tax. Section 2400 of the Internal Revenue Code, as added by Section 552 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, imposes an excise tax on jewelry sold at retail. It is not a tax imposed upon the buyer for the privilege of buying; rather, it is a tax imposed on the seller for the privilege of selling, and it is the person who sells at retail who is required by Section 2403 of the Code to make returns and pay the tax. The pattern of this tax is the same as that of the manufacturers' excise tax imposed by Section 3400 *et seq.*, of the Internal Revenue Code. It is settled that the incidence of such a tax is on the seller and that, when the economic burden of the tax is passed on to the purchaser, it becomes not a tax on the purchaser but merely a part of the total purchase price[1] or cost of the article to such purchaser. *Lash's Products Co.* v. *United States*, 278 U. S. 175; *Shearer* v. *Commissioner*, 48 F. 2d 552 (C. A. 2d). Here, the taxpayer did not pay the federal retailers' excise tax as such, but rather an increased purchase price due to

[1] Cf. Section 2409 of the Internal Revenue Code, which imposes a fine on a retailer who represents that the sale price of the article does not include the tax.

the passing on to her of the economic burden of the tax. Since the Tax Court chose to accept as the best evidence of value at the date of gift the price paid by the taxpayer a few months before in the case of the 1947 gift, and the price paid for the 1946 gift plus an amount representing the increase in market value since purchase in 1941, it cannot be said that the Tax Court used unacceptable standards or criteria as a basis for its findings of value, or that such findings were clearly erroneous.[2]

2. The decision of the court below, approving the Tax Court's inclusion of the federal retailer's excise tax in the purchase price of the gift, is supported by the decision of the Second Circuit in *Duke* v. *Commissioner, supra,* and is not in conflict with the decisions of any other courts. We are advised of only two cases on the point, other than the instant case, *Estate of Gould* v. *Commissioner,* 14 T. C. 414, and *Duke*

[2] We think the court below is in error in suggesting (R. 101) that theoretically, if the Tax Court's position is accepted, each time a diamond is sold at retail it would acquire as an additional value the amount of the excise tax paid by the seller. In the first place, it is difficult to visualize repeated sales *at retail* of the same article. In the event of a subsequent sale at retail, however, the price which would be paid by the purchaser, including tax, would, no doubt, be governed by the market, or what the purchaser would be willing to pay, and the price that the purchaser would pay on a second sale at retail would be cogent evidence of fair market value at that time. This dispels the incongruity envisioned by Judge Goodrich in his dissent below. (R. 103.)

v. *Commissioner, supra.* It is possible that the paucity of litigation on the question is attributable to the rather high exclusions and exemptions allowed by Section 1003 (b) of the Internal Revenue Code, and Section 1004 (a), as amended by Section 455 of the Revenue Act of 1942, c. 619, 56 Stat. 798. Whatever the reason for the lack of such litigation, it is clear that the question is not a frequently recurring one.

CONCLUSION

The decision below is correct, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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